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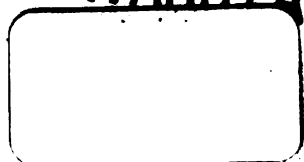
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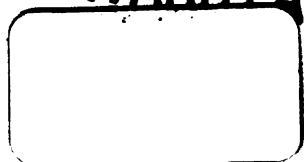
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Alabama,

DURING THE

NOVEMBER TERM, 1903-1904.

-BY-

PHARES COLEMAN,

STATE REPORTER.

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VOL. CXLII.

MONTGOMERY, ALA.

THE BROWN PRINTING CO., STATE PRINTERS AND BINDERS,
1906.

Entered according to act of Congress, in the year 1906, by
WILLIAM D. JELKS, GOVERNOR OF ALABAMA,
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Rec. June 21, 1906

OFFICERS OF THE COURT

DURING THE TIME OF THESE DECISIONS.

THOMAS N. McCLELLAN*, CHIEF JUSTICE, Athens.
JONATHAN HARALSON*, ASSOCIATE JUSTICE, Selma.
JOHN R. TYSON*, ASSOCIATE JUSTICE, Montgomery.
HENRY A. SHARPE†, ASSOCIATE JUSTICE, Birmingham.
JAMES R. DOWDELL*, ASSOCIATE JUSTICE, LaFayette.
JOHN C. ANDERSON*, ASSOCIATE JUSTICE, Demopolis.
N. D. DENSON*, ASSOCIATE JUSTICE, LaFayette.
R. T. SIMPSON*, ASSOCIATE JUSTICE, Florence.

MASSEY WILSON, ATTORNEY-GENERAL, Grove Hill.

ROBERT F. LIGON, CLERK, Montgomery.
JUNIUS. M. RIGGS, MARSHAL, Montgomery.
LEON C. McCORD, SECRETARY, Guntersville.

*By Act of Legislature, approved October 10, 1903 (General Acts of 1903, p. 493), the number of Associate Justices was increased to six; and the Chief Justice and these six Associate Justices were elected at the general election in 1904, and commissioned in November, 1904.

†Term of office expired.

**JUDGES OF CIRCUIT COURTS DURING THE TIME THE CASES
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1st Circuit.....	HON. JOHN C. ANDERSON.....	Demopolis.
2d Circuit.....	HON. J. C. RICHARDSON.....	Greenville.
3d Circuit.....	HON. A. A. EVANS.....	Clayton.
4th Circuit.....	HON. JOHN MOORE.....	Marion.
5th Circuit.....	HON. N. D. DENSON.....	LaFayette.
6th Circuit.....	HON. SAMUEL H. SPROTT.....	Livingston.
7th Circuit.....	HON. JOHN PELHAM.....	Anniston.
8th Circuit.....	HON. OSCEOLA KYLE.....	Decatur.
9th Circuit.....	HON. J. A. BILBRO.....	Gadsden.
10th Circuit.....	HON. A. A. COLEMAN.....	Birmingham.
11th Circuit.....	HON. E. B. ALMON.....	Tuscumbia.
12th Circuit.....	HON. JOHN P. HUBBARD.....	Troy.
13th Circuit.....	HON. WILLIAM S. ANDERSON.....	Mobile.
14th Circuit.....	HON. JAS J. RAY.....	Jasper.
15th Circuit*.....	{ HON. JOHN G. WINTER.....	Montgomery.
	{ HON. TERRY RICHARDSON.....	Montgomery.

*Hon John G. Winter died, and Hon. Terry Richardson was appointed to succeed him.

**CHANCELLORS DURING THE TIME THE CASES REPORTED
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Northern Chancery Division.....	HON. WILLIAM H. SIMPSON,	Decatur.
Northeastern Chancery Division....	HON. R. B. KELLY,	Anniston.
Northwestern Chancery Division....	HON. J. C. CARMICHAEL,	Birmingham.
Southeastern Chancery Division....	HON. W. L. PARKS,	Troy.
Southwestern Chancery Division....	HON. THOMAS H. SMITH,	Mobile.

SUPERNUMERARY JUDGE.

HON. A. H. ALSTON.....	Clayton.
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**JUDGES OF INFERIOR COURTS OF LAW AND EQUITY
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Bessemer City Court.....	HON. B. C. JONES..... Bessemer.
Birmingham City Court. {	HON. W. W. WILKERSON*..... Birmingham.
	HON. CHAS. A. SENN*..... Birmingham.
	HON. CHAS. W. FERGUSON*... Birmingham.
Gadsden City Court.....	HON. JOHN H. DISQUE..... Gadsden.
Mobile City Court.....	HON. O. J. SEMMES..... Mobile.
Montgomery City Court. {	HON. A. D. SAYRE..... Montgomery.
	HON. WILLIAM H. THOMAS... Montgomery.
Selma City Court.....	HON. J. W. MABRY..... Selma.
Talladega City Court....	HON. G. K. MILLER..... Talladega.
Tuscaloosa County Court	HON. J. J. MAYFIELD..... Tuscaloosa.
Criminal Court of Jefferson County..... {	HON. SAMUEL E. GREENE..... Birmingham.
	HON. DANIEL A. GREENE..... Birmingham.
Criminal Court of Pike County.....	HON. T. L. BOROM..... Troy.
Walker County Law and Equity Court‡.....	HON. PETTON NORVELLE..... Jasper.

*Hon. W. W. Wilkerson, Senior Judge, died, and Hon. Chas. A. Senn was appointed to succeed him on June 30, 1903; and Hon. Chas. W. Ferguson was appointed to succeed Judge Senn on July 10, 1903.

‡This court was abolished by Act of Legislature approved March 6, 1903.—Acts of 1903, p. 101.

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CASES

IN THE

SUPREME COURT OF ALABAMA.

NOVEMBER TERM, 1904.

Johnson v. The State.

Indictment for Obtaining Money Under False Pretenses.

1. *Indictment for obtaining money under false pretenses; Code form sufficient.*—An indictment for obtaining money under false pretenses which follows the form set out in the Code (Criminal Code, Sec. 4923, form 48) is sufficient and not subject to demurrer.
2. *Obtaining money under false pretenses; admissibility in evidence of confession; corpus delicti.*—On a trial under an indictment for obtaining money under false pretenses, in the absence of independent evidence as to the falsity of the representations made by defendant, a confession of the defendant to the effect that such representations were false, is not admissible; and it is error for the court to refuse to exclude such confession upon motion made by the defendant upon the ground that the *corpus delicti* had not been proved.
3. *Corpus delicti; when confession not sufficient to support conviction.*—A confession not corroborated by independent evidence of the *corpus delicti* is not sufficient to support a conviction of felony.

APPEAL from the Criminal Court of Jefferson.

Tried before the HON. DANIEL A. GREENE.

The appellant in this case, W. E. Johnson, was indicted, tried and convicted for obtaining money under false pretenses. The first count of the indictment was in words and figures as follows: "The grand jury of said county charge that before the finding of this indictment W. E. Johnson, whose name is to the grand

[Johnson v. The State.]

jury otherwise unknown, did falsely pretend to Louis E. Brinkmeyer, with the intent to defraud, that he had and owned one-third interest in a United States Government certificate for the sum of fifty-eight hundred dollars, which had been given for work done in Mississippi for the United States Government, and by means of such false pretense obtained from the said Louis E. Brinkmeyer twenty-five dollars in lawful money of the United States of America." To this count of the indictment, the defendant demurred upon the following grounds: "1st. Said count fails to aver or show that defendant obtained money or property from any one by means of his said false pretenses. 2nd. Said count fails to aver or show that defendant obtained any money or property from L. E. Brinkmeyer or that said L. E. Brinkmeyer was injured or suffered by reason of said false pretenses." This demurrer was overruled.

Upon the introduction of one L. E. Brinkmeyer as a witness for the State, he testified that about Dec. 15th, 1903, the defendant obtained \$25.00 from him by representing to him that he had a draft or a Government certificate for \$5,400 or \$5,800, and that upon this representation he let the defendant have \$25.00; that after defendant was arrested, he saw the defendant in jail, and without his making any threats or offering the defendant any inducement, the defendant stated that he had lied to him. The defendant objected to the witness testifying to the confession made to him upon the ground that the *corpus delicti* had not been proved; and after the witness had testified to the confession, he moved to exclude said confession upon the same ground. The court overruled the objection and motion, and to each of these rulings the defendant separately excepted.

The facts of the case are sufficiently stated in the opinion.

No counsel marked as appearing for appellant.

MASSEY WILSON, Attorney-General, for the State.

[Toliver v. The State.]

McCLELLAN, C. J.—The court did not err in overruling the demurrer to the first count of the indictment. It is in the Code form.—Code 1896, § 4923, Form 48, Criminal Code, p. 330.

The case being tried on the first count, a primal ingredient of the offense was the falsity of the alleged representations whereby defendant obtained money from Brinkmeyer. Without proof of such falsity the *corpus delicti* was not shown. The only evidence offered to show that the representations were false was the confession of the defendant to that effect. In the absence of independent evidence in that connection this confession was not admissible, and should have been excluded on defendant's objection based upon the ground that the *corpus delicti* had not been proved; and the general charge should have been given for the defendant. "A confession not corroborated by independent evidence of the *corpus delicti* is not sufficient to support a conviction of felony."—*Matthews v. State*, 55 Ala. 187; *Smith v. State*, 133 Ala. 145; *Stringer v. State*, 135 Ala. 60.

Reversed and remanded.

TYSON, SIMPSON and ANDERSON, J. J., concurring.

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Indictment for Robbery.

- 1 *Robbery; conspiracy; admissibility of evidence.*—Where two persons are jointly indicted for robbery, and the evidence tends to show not only that each of them participated in the robbery, but there was a conspiracy between them to commit the offense, it is competent, on a separate trial of one of them, to show what was said and done by the other defendant in furtherance of the common design, after the defendant who was being tried, had absented himself from the scene of the crime.
2. *Same; admissibility of evidence.*—On a trial under an indictment charging two defendants with robbery, and where there is a severance, it is competent for the defendant on trial to show that some other person, and not himself, was with his co-de-

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fendant when the robbery was committed; but evidence as to the character of such other person in the community, is not admissible in evidence.

3. *Reasonable doubt; charge of court in reference thereto.*—On the trial of a criminal case, a charge is erroneous and properly refused which instructs the jury that “before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is inconsistent with the defendant’s guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant’s guilt, that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty.”

APPEAL from the City Court of Montgomery.

Tried before the HON. WILLIAM H. THOMAS.

The appellant in this case was tried and convicted under the following indictment: “The grand jury of said county charge that before the finding of this indictment, Shad Dean and Willie Tolliver alias Crack, feloniously took five bills of the denomination of five dollars each of the lawful currency of the United States of America, the property of J. J. Boyd, from his person and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same, against the peace and dignity of the State of Alabama.” A severance was demanded, and the defendants replied separately. It appears from the record that the defendant, who is the appellant in this case, demurred to the indictment, which demurrer was overruled by the court; but the demurrer is not set out in the record.

Boyd, the person alleged to have been robbed, testified that he went down an alley-way, and while enroute he was assaulted by Shad Dean and Will Tolliver; that he recognized the two defendants when they assaulted him, that they struck him a blow which rendered him unconscious and that he did not regain consciousness until he had been removed to a stable near the scene, and the two men were then standing over him. He positively identified the defendant and Dean as the two men

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who assaulted him and identified Dean as one of the men who were standing over him when he regained consciousness, but would not state positively that the other was the appellant, but gave as his best judgment that he was the man. He stated that when he regained consciousness he spoke to the men, whereupon the one whom he took to be the appellant, ran, while the other, Dean, remained and engaged in a conversation with witness. The State offered this conversation, to which the appellant objected, but the court overruled the objection, the testimony was admitted and defendant duly excepted.

This witness also testified that in about a minute after the defendant ran off, Dean ran off in the same direction. The defendant objected to this testimony, and moved to exclude it. The court overruled the motion and the defendant duly excepted.

The defendant attempted to show that the person who was with Dean at the time of the robbery was one Claud Henry, and during the examination of one of the witnesses introduced by the defendant, he was asked what was the character of Claud Henry in the community where he lived. The State objected to this question. The court sustained the objection, and the defendant duly excepted. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charge, and separately excepted to the court's refusal to give the same as asked: "Before the jury can convict the defendant, they must be satisfied to a moral certainty not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant's guilt, that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty."

No counsel marked as appearing for appellant.

MASSEY WILSON, Attorney-General, for the State.—If a conspiracy in fact existed between the two parties to

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rob Boyd, the statement of one of them made in the absence of the other is admissible against the absent conspirator.—*Hunter v. State*, 112 Ala. 77; *Thomas v. State*, 133 Ala. 139, 145; *Hudson v. State*, 137 Ala. 60, 66.

A defendant may show in all cases that some one else committed the crime, but evidence of the guilt of another must relate to and be derived from the facts and circumstances of the killing.—*Banks v. State*, 72 Ala. 522, 3 h. n. 526; *Austin v. State*, 63 Ala. 178; *Brown v. State*, 120 Ala. 342, 3 h. n. 348.

The charge asked by the defendant and refused by the court has been often condemned.—*Sanders v. State*, 134 Ala. 74, 58.

TYSON, J.—What the objections were, taken by demurrers against the sufficiency of the indictment, the record does not inform us. But, whatever they were, they are without merit.—Form 77 p. 335 of the Code.

It was open to the jury to find under the evidence, not only that defendant actually participated in the robbery, but that there was a conspiracy between him and Dean to commit the offense. It was, therefore, entirely competent for the prosecution to show what was said and done by Dean in furtherance of the common design after the defendant had absented himself from the scene of the crime as a part of the *res gestae* of the transaction.—*Hunter v. State*, 112 Ala. 77; *Thomas v. State*, 133 Ala. 139; *Hudson v. State*, 137 Ala. 60.

The defendant attempted to show that one Claude Henry was with Dean when the robbery was committed and not himself. This was, of course, entirely competent. But what Henry's character was in that neighborhood was not proper subject matter of enquiry. If Henry had been charged with the commission of the crime and was on trial, the prosecution could not have shown, to bolster its side of the case, what his character was, no more than it could have shown what this defendant's character was.

Evidence of the guilt of another must relate to and be derived from the facts and circumstances of the rob-

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bery.—*Banks v. State*, 72 Ala. 522; *Austin v. State*, 63 Ala. 178; *Brown v. State*, 120 Ala. 342.

The written charge requested by defendant was properly refused.—*Sanders v. State*, 134 Ala. 78.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J. J., concurring.

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Indictment for Murder.

1. *Constitutional law; act creating 14th Judicial Circuit local law and unconstitutional.*—The act of the Legislature, approved March 6, 1903, "to create the 14th Judicial Circuit of the State of Alabama, and fix the time of holding court therein," etc., (Acts 1903, p. 88), is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply to the Legislature for the passage of such law not having been given as provided by section 106 of the Constitution, such law is unconstitutional and void.
2. *Trial and its incidents; when judgment of conviction void.* Where the trial of a criminal case is had at a time not authorized by law for the holding of the circuit court trying said case, the judgment of conviction rendered in such case is void, and will not support an appeal.

APPEAL from the Circuit Court of Walker.

Tried before the HON. JAMES J. RAY.

The appellant in this case, Henry Walker, was indicted and tried for murder, was convicted for murder in the first degree, and sentenced to be hanged. The facts of the case necessary to an understanding of the decision upon the present appeal are sufficiently stated in the opinion.

L. D. GRAY, for Appellant.—The Act creating the Fourteenth Judicial Circuit was a local law, and not passed as required by the Constitution.—*Holt v. Mayor*

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and *Aldermen of Birmingham*, 111 Ala. 369; *State v. Algood*, 87 Tenn. 164.

MASSEY WILSON, Attorney-General, and J. H. BANKHEAD, JR., for the State.—The fact that the act creating the 14th Circuit is merely in effect an act further dividing the State into convenient circuits, or redistricting the circuits, is conclusive that it does not apply to a political subdivision less than the whole. The Circuit Court is an integral part of the judicial power of the State, and a division of it into convenient circuits as directed by the Constitution, whether by an act covering all the counties of the State at once, or by dividing existing circuits so as to make others, relating as it does to an integral part of the judicial power of the whole State, applies to the whole State. The purpose of the restrictions thrown around the passage of local bills was to retard and prevent their passage. The Legislature, by the passage of the 14th Circuit Act, declared that one more circuit was necessary to carry out the direction to divide the State into convenient circuits.

A law is not local that operates upon a subject in which the people at large are interested.—*Healey v. Dudley*, 5th Lans. 115.

A proper distinction must be drawn between a subject of legislation, as the term is used in the above case, and a matter or thing locally situated as used in our Constitution. While this distinction has not been specifically pointed out, the Supreme Court of several States, have, by their decisions, in effect drawn it.

The Supreme Court of Louisiana, in the case of *State v. Dulan*, 35 La. Ann. 1141, held that an act establishing Criminal District Court for New Orleans is a general law. An act creating criminal circuit court of Jefferson County, Indiana, was held not in contravention of the constitutional prohibition against special legislation.—*Eitel v. State*, 33 Ind. 201.

A law is neither local or special which results directly or indirectly from a specific constitutional requirement. *State ex rel. Berry v. Shields*, 4 Mo. App. 259; *State ex rel. ——— v. Yancey*, 123 Mo. 401.

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An act to require Judges of the 16th and 31st Circuits to hold court for each other is not special legislation, because the Constitution provides that circuit judges may hold court for each other when required by law. *Toll v. Jerome*, 101 Mich. 468; *State ex rel. Banham v. Yancey*, 123 Mo. 391; *State ex rel. Aull v. Field*, 119 Mo. 593.

While the impression exists in some quarters that no local bill can be passed without notice as required by section 106 of the Constitution, the Supreme Court to avoid numerous absurd positions in carrying out other provisions of the Constitution, and in accordance with the construction of similar constitutions of other states, must adopt a different rule. In order to give effect to all of the provisions of the Constitution and permit the Legislature to do the things directed by the Constitution, exceptions must be made to the general rule. A proper construction of other clauses in the Constitution make exceptions to the rule.

The Supreme Court of Louisiana, in the case of *Excelsin Planting and M'fg. Co.*, 39 La. Ann. 455, held that where the Constitution has in express terms conferred on the general assembly the duty, or even power, to adopt legislation on a particular subject, even though local in character, such duty and power are not subject to the restrictions imposed by the article requiring notice; and cite the following cases in support of the proposition:—*Tax Payers Asso. v. City of New Orleans*, 33 La. Ann. 569; *Davidson v. Houston*, 35 La. Ann. 492; *State v. Dalan*, 35 La. Ann. 1142.

DOWDELL, J.—Upon the authority of the case of *The State of Alabama ex rel. The Attorney-General v. T. Scott Sayre, Judge, etc.*, rendered at this term of the court, opinion in MS., the Act of the Legislature, approved March 6th, 1903, creating the 14th judicial circuit to be composed of the counties of Walker and Winston, must be declared void as being violative of the Constitution in its enactment.

The Act in question, however, did not purport to create a circuit court of Walker county, for such a court al-

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ready existed under the law, but an appointment of a presiding judge for such court was provided for in section two of said Act, and under the provision of said section the Hon. J. J. Ray was appointed by the Governor to that office.

By this state of the case it will be seen that we have a legally constituted court presided over by one not a *de jure* judge.

Thus the question is presented as to the validity of judgments and proceedings of a court when presided over by one who has no legal right or title to the office of judge.

Under the facts of the case, there can be no doubt but that the Hon. J. J. Ray, when presiding over the circuit court, was a judge *de facto*.

The proposition of law is well settled by adjudications not only of this court, but courts of other jurisdictions that the proceedings and judgments of a court presided over by a *de facto* officer are not void.—*Masterson v. Matthews*, 60 Ala. 260; *Roberts v. State*, 126 Ala. 74; *Norton v. Shelby County*, 118 U. S. 425; *Gorman v. People*, 17 Col. 596; S. C. 31 Am. St. Rep. 350, and see authorities collated in *Roberts v. State*, *supra*, on page 78.

It appears from the record in this case, that the court at which the defendant was indicted was organized on Monday, the 4th day of January, 1904, and it further appears that the indictment was returned into court on the 10th day of February, 1904, and on that day the defendant was arraigned and a future day set for the trial of his cause. And on the 17th day of February, 1904, the cause was tried and a judgment of conviction rendered.

By an Act approved September 28th, 1903, Entitled An Act "To fix a time of holding courts in the 14th judicial circuit of Alabama," page 391, Local Acts, session 1903, it was provided as follows in section 1 of said Act: "In the county of Walker the court shall be held as follows: The first term shall begin the first Monday in January and may continue until the 30th day of June, except the two weeks beginning the third Monday in March. The second term of the circuit court in Walker county, shall begin the first Monday in October and

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may continue until the end of the week which begins with the second Monday in December."

It is manifest that the term of the court at which the defendant was indicted and tried was convened under the provisions of said Act. The striking down of the Act approved March the 6th, 1903, creating the 14th judicial circuit involves the validity of the Act of the 28th of September, 1903.

Section 45 of the Constitution provides, that "each law shall contain but one subject, which shall be clearly expressed in its title," etc. At the time of the passage of said Act, there was no 14th judicial circuit of Alabama, and the time for holding the circuit court in Walker county is not expressed in the title. The provision in the body of the Act fixing the time for holding the circuit court in Walker county is a subject not expressed in the title of the Act, the Act, therefore, in so far as it relates to fixing the time for holding the circuit court is violative of said section of the Constitution, and it necessarily follows that the same must be declared void.

We must, therefore, look elsewhere to ascertain the time fixed by law for holding the circuit court in Walker county, and the only law upon the subject is embraced in § 908 of the Code, which fixes the time for holding the circuit court in the 10th judicial circuit, of which circuit the county of Walker is a part. From an inspection of this section of the Code it will be seen that the indictment in this case was found, and the defendant was arraigned, and a day set for a trial at a time different from that fixed by law for the holding of the court, and therefore, at a time not authorized by law. This being the case it follows that the indictment was void as well as the arraignment, and the order setting the day for trial; and this is so whether the judge presiding be an officer *de jure* or *de facto*, and for this reason the judgment of conviction was erroneous, and which error necessarily works a reversal of the case. The judgment is, therefore, reversed and the cause will be remanded to the end that the circuit court may quash the indictment, and hold the defendant to answer a new indictment.

The defendant will remain in custody until discharged according to law.

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Reversed and remanded.

MCCLELLAN, C. J., HARALSON, TYSON, SIMPSON, ANDERSON and DENSON, J. J., concurring.

Since writing the foregoing opinion, our attention has been called to an Act approved December 13th, 1900, Session Acts 1900-1901, page 646, in which the time for holding the courts in the 10th judicial circuit are changed from the times as fixed by § 908 of the Code. From this it appears that the trial in the foregoing case was had at a time not authorized by law for the holding of the circuit court of Walker county. The judgment of conviction was therefore, void, and there is nothing to support the appeal. The judgment of reversal rendered by this court at a former day of this term, must, therefore, be set aside, and a judgment will be now rendered dismissing the appeal.

MCCLELLAN, C. J., HARALSON, TYSON, SIMPSON, ANDERSON and DENSON, J. J., concurring.

Richardson v. The State.

Indictment for Robbery.

1. *Bill of exceptions; when properly stricken from the file.*—Where it appears from the record in a case that the bill of exceptions was not signed within the time prescribed by law, or within the time fixed by order of the court, such bill of exceptions will not be considered on appeal, and will be stricken from the file on motion; and where by order of the court the defendant in a criminal case is given "until January 5th, 1905," in which to have the bill of exceptions signed by the presiding judge, the time for signing the bill of exceptions expires on the night of January 4th, and if the time is extended on the 5th of January, it is after the expiration of the time allowed by order of the court.

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APPEAL from the Circuit Court of Gadsden.

Tried before the HON. JOHN H. DISQUE.

The appellant in this case was indicted, tried and convicted for robbery, and was sentenced to imprisonment in the penitentiary for 40 years.

In the Supreme Court there was a motion made to strike the bill of exceptions from the file upon the ground that it was not signed within the time allowed by law.

No counsel marked appearing for appellant.

MASSEY WILSON, Attorney-General, for the State.

SIMPSON, J.—The motion to strike the bill of exceptions from the files is sustained.

On November 16th 1904, the defendant was sentenced and the court granted him "until January, 5th 1905" in which to have the bill of exceptions signed by the presiding judge."

An order was made by the court, on January 5th 1905, (in vacation) extending the time "until January 6th 1905." The words "until January 5th" excluded that day, and consequently the time for signing the bill of exceptions expired on the night of January 4th.—*Johnson v. State*, 37 So. Rep. 421; *A. & M. Co. v. Marcus*, 128 Ala. 355; *Rosson v. State*, 92 Ala. 76; *Wright v. State*, 136 Ala. 50; *Scott v. State*, 37 So. Rep. 366.

The motion to strike the bill of exceptions is sustained and the judgment of the Court is affirmed.

Affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J. J., concurring.

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144 26*Indictment for Murder.*

1. *Pleas in abatement may be filed after plea to merits, in discretion of lower court; when record shows filing.*—Where the defendant had pleaded to the merits the trial court in its discretion could permit the withdrawal of such plea and allow the filing of pleas in abatement, and, though the record does not in terms show that the court permitted the filing of such pleas, they were ordered to be filed and made a part of the record and the court sustained a demurrer thereto, the conclusion is that the court allowed the filing of the pleas and they will be considered by this court as having been filed.
2. *Presence of stenographer in grand jury room; when authorized.* A plea in abatement setting up that there was present during the examination of the witnesses before the grand jury which found the indictment, a stenographer, duly sworn as such for the grand jury, and who was not a member thereof, is bad on demurrer, the act of December 10, 1900 (Acts 1900-01, p. 308) authorizing the employment of a stenographer to attend before the grand jury.
3. *Concurrence of grand jurors; when shown.*—Where the record shows that the grand jury which returned the indictment was composed of seventeen members, a plea in abatement, that one of the jurors was by reason of extreme deafness incompetent to hear the evidence, is bad on demurrer, since it does not appear that sixteen of the grand jurors did not hear the evidence and vote upon it to find the indictment.
4. *Indictment for murder; averment of means.*—An indictment which charges that the defendant unlawfully and with malice aforethought killed A. B. "by hitting him or striking him with a hatchet or with some blunt instrument to the grand jury unknown," etc., is sufficient and not subject to demurrer.
5. *Same; evidence of drinking, when irrelevant.*—On a trial under an indictment for murder, evidence that deceased was a man who drank a good deal is properly excluded when offered before there was any evidence of self-defense, or any other issue which might have rendered the evidence relevant.
6. *Same; cross examination of witness.*—In such case, where the State brought out on direct examination of a witness that the

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deceased was in a saloon shortly before the killing and was "drinking heavily," it was the right of the defendant on cross-examination to have the witness state the facts upon which the statement was predicated.

7. *Same; immaterial testimony.*—In such case, whether the deceased was in the saloon on the day previous to the day on which he was killed, was immaterial to the issues.
8. *Same; objection to question and answer.*—When an objection is made and sustained to a question propounded to a witness, but the record is silent as to the answer expected, this court cannot consider the correctness of the ruling.
9. *Same; predicate for confession; when sufficient.*—Where the officer who arrested the defendant testified that he made no threats against nor promises to the defendant nor offered him any inducements to make a statement, nor did others in his presence, he was properly permitted to state what the defendant told him about the killing.
10. *Same; same; when evidence of mob immaterial.*—Where the defendant sought to show that a mob was formed on the night of the killing to take him away from the officer who arrested him, and it does not appear that such fact existed prior to or contemporaneous with the making of a statement to the officer regarding the killing, the court properly sustained an objection to questions calling for such testimony.
11. *Same; character for honesty not in issue.*—On a trial under an indictment for murder the defendant's character for honesty is not in issue.
12. *Same; character of defendant's parents.*—In such case, the character of defendant's parents was not a subject of inquiry.
13. *Same; irrelevant testimony.*—In such case the fact that deceased claimed to have been robbed, had no tendency to prove that he was not a person who maintained a good character for peace and quietude.
14. *Same; argument of counsel; effect of showing for absent witness.* In such case, where the state has admitted showings of certain witnesses for the purpose of going to trial, a statement of the solicitor that the State did not thereby admit the truth of such testimony, but that if the witnesses were present they would swear as there shown, was proper.
15. *Same; right of defendant to have depositions and showings taken out by the jury.*—Under Code, sections 1834 and 5292, it is not a matter of right on the part of the defendant to have the jury take written depositions with them for use in their deliberations; and where the court sustained objections to certain

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portions of the showings and depositions of defendant's witnesses, and the portions which were not ruled out were read to the jury, the court properly refused to permit the jury to carry the showings and depositions out with them.

16. *Same; alternative averments.*—Under an indictment for murder alleging the means or instrument with which the killing was done in the alternative—"by hitting him or by striking him with a hatchet or with some blunt instrument to the grand jury unknown"—a charge which instructs the jury to find the defendant not guilty if the grand jury knew from the evidence before them the means or instrument used in producing death, is properly refused unless limited to the count containing the averment that the means were unknown.
17. *Same; charge to jury.*—Charges which invade the province of the jury are properly refused.
18. *Same; same; reasonable doubt.*—A charge that "a reasonable doubt is a doubt for which a reason can be given," is bad and properly refused.
19. *Same; same; conviction of manslaughter under indictment for murder.*—Under an indictment in the Code form (Code Section 4923, No. 63) the defendant may be convicted of manslaughter, and a charge to the jury to acquit the defendant if there is no proof of any material allegation of murder, is properly refused.
20. *Same; same; freedom from fault.*—Charges to the jury under an indictment for murder to acquit the defendant under his plea of self-defense if he was reasonably without fault in bringing on the difficulty, are properly refused.
21. *Same; same; constituents of self-defense.*—A charge to the jury under an indictment for murder which fails to set forth the constituents of self-defense, is properly refused.

APPEAL from Criminal Court of Jefferson.

Tried before the HON. D. A. GREENE.

The appellant, Taylor Smith, was indicted for the murder of Martin J. Conniff, was tried and convicted of murder in the second degree and his punishment fixed at thirty years imprisonment in the penitentiary.

The indictment was in the following form:

"The State of Alabama,

Jefferson County.

The Criminal Court of

Jefferson County.

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The grand jury of said county charge that before the finding of this indictment Taylor Smith, unlawfully and with malice aforethought killed Martin J. Conniff, by hitting him or by striking him with a hatchet, or with some blunt instrument to the grand jury unknown, against the peace and dignity of the State of Alabama.

H. P. Heflin, Solicitor.

On May 6, 1904, the defendant filed a plea in abatement to the indictment, containing four grounds, the first and second grounds, being in substance that there was present during the examination of witnesses before the grand jury that returned the indictment, one Jack T. Stallings, as a stenographer for the grand jury, duly sworn, who was not a member of said grand jury, nor an officer authorized by law to be present. The third and fourth grounds were in substance, that all of the grand jurors who voted to return the indictment did not hear the evidence introduced, upon which the indictment was found, in that one of the jurors was by reason of extreme deafness, incompetent to hear and understand the evidence. The plea was duly sworn to by the defendant. The court sustained a demurrer to the plea interposed by the solicitor. Thereupon the defendant demurred to the indictment on several grounds, in substance as follows: 1st: The alternative averment that deceased was killed "with some blunt instrument to the grand jury unknown" is vague, indefinite and uncertain. 2nd: It does not appear whether it was intended to charge the deceased was killed by being hit or struck with a hatchet, or some blunt instrument to the grand jury unknown, or that the words "by hitting him or by striking him" refer to the averment charging the killing to have been with a hatchet. 3rd: For that it does not clearly appear from the averments of the indictment whether it is intended to charge that the death of the deceased was caused by being hit or struck with some blunt instru-

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ment, or by the use of said blunt instrument in some other manner. The court overruled the demurrer.

The evidence for the State tended to show that the deceased was killed by the defendant as the result of a blow on the head, with a hatchet; that the defendant was a porter in a bar in the city of Birmingham and the deceased came in and called for defendant who was in a back room of the bar; that defendant came out, but deceased did not speak to him and defendant returned to the room, followed by deceased and resumed his duties when deceased struck him with a small piece of wood, and the two engaged in a scuffle during which defendant struck deceased on the head with a hatchet, causing his death.

The evidence for the defendant tended to show that his character was good in the neighborhood where he had formerly lived, Hale County, Ala., this being shown by depositions of witnesses residing at that place; that when deceased came in the room where defendant was working the latter was cutting kindling with a hatchet; that deceased asked him his name and what he was doing and defendant replied to the question, and deceased then struck him in the back with a piece of wood and defendant ran, followed by deceased, and the latter struck him again and grabbed him and a scuffle followed in which defendant inflicted the fatal blow. There was other evidence tending to show that the character of deceased for peace and quietude was not good and that he was a turbulent, quarrelsome and dangerous man.

The exceptions reserved by the defendant to the admissibility of evidence are sufficiently shown in the opinion.

In the course of his argument to the jury the solicitor used the following language: "Now, as to the showings of these witnesses who were absent, but whose testimony the State admitted for the purpose of going to trial, it was not meant that we admitted its truth, but that if witnesses were present they would swear what was contained in the showings." The defendant objected to this part of the argument of the solicitor and moved to exclude the same from the jury, the court overruled the

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objection and motion and the defendant excepted.

Upon the introduction of the evidence the defendant requested the court to give the following written charges to the jury, which the court refused to give and he excepted: (1.) "If the jury believe from the evidence that the grand jury which found the indictment in this case knew from the evidence before them the means or instrument used in producing death of the deceased, they cannot find the defendant guilty." (2.) "If the jury believe from the evidence that from the evidence before it the grand jury that returned the indictment in this case knew that Martin J. Conniff, the deceased, was killed with a hatchet, then the defendant could not be convicted under the present indictment." (3.) "If the jury believe from the evidence that the grand jury which found the indictment in this case knew or could have learned by the employment of reasonable diligence, the weapon or instrument used by the defendant in causing the death of Martin J. Conniff, the deceased, the defendant cannot be convicted under the present indictment." (4.) "If the jury believe the evidence they will find the defendant not guilty." (5.) "If the jury believe the evidence they cannot find the defendant guilty of murder in the first degree." (6.) "If the jury find believe the evidence they cannot find the defendant guilty of murder in the second degree." (12.) "A reasonable doubt is a doubt for which a reason can be given." (17.) "If the jury believe from the evidence that at the time the defendant inflicted the fatal blow on the deceased that he was not actuated by malice, but that he acted from a suddenly aroused, adequate provocation, or that he acted in self-defense, they must acquit him." (19.) "If the jury believe from the evidence that the defendant was reasonably without fault in bringing on the fatal difficulty and that at the time he inflicted the fatal wound on the deceased, there existed a real or apparent danger, or a present, impending, imperious necessity to strike in order to save his own life or to save himself from a great bodily harm, and that there was no reasonable mode of escape by retreating or by avoiding the combat with safety, they must find the defendant not

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guilty." (20.) "If the jury believe from the evidence that the defendant was reasonably without fault in bringing on the fatal difficulty, and that at the time he inflicted the fatal wound on the deceased there existed a real or apparent danger, or a present, impending, imperious necessity to strike in order to save himself from great bodily harm, they must find the defendant not guilty."

B. M. ALLEN, for appellant.—The demurrer to the indictment should have been sustained.—*Rogers v. State*, 117 Ala. 192; *King v. State*, 137 Ala. 47; *Noble v. State*, 59 Ala. 73; *Horton v. State*, 53 Ala. 488; *Raiser v. State*, 55 Ala. 64; *Pickett v. State*, 60 Ala. 77; *Hornsby v. State*, 94 Ala. 55. It appearing on the trial that a fact known to the grand jury was averred to be unknown, a conviction could not be had.—*Winter v. State*, 90 Ala. 637; *Wells v. State*, 88 Ala. 239; *James v. State*, 115 Ala. 23. The circumstances surrounding the defendant at the time of the confessions were admissible as bearing upon their voluntary character.—*Beckham v. State*, 100 Ala. 15; *Brister v. State*, 26 Ala. 128; *Bob v. State*, 32 Ala. 56; *Aiken v. State*, 35 Ala. 397; *King v. State*, 40 Ala. 314. The court should have permitted defendant to show the condition of deceased immediately prior to the killing. The remarks of the solicitor were improper and prejudicial to the defendant. The court erred in not allowing the jury to take the depositions and showing out with them.

MASSEY WILSON, Attorney-General, *contra*.—The plea in abatement came too late.—*Thayer v. State*, 138 Ala. 1; *Davis v. State*, 137 Ala. 10. The motion to quash and the plea were without merit. The stenographer was properly with the grand jury when the indictment was found.—*Thayer v. State*, 138 Ala. 39. The objection urged as to the qualifications of the grand juror is within the curative influence of Code § 5269. The demurrer to the indictment was properly overruled. *King v. State*, 137 Ala. 47. Evidence of the habits of deceased as to drinking was not admissible when offered.—*Suringer v. State*, 134 Ala. 120. The record does

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not show what answer was expected from the witness Roberts and the ruling cannot be reviewed.—*Ross v. State*, 36 So. 718. The confession was properly admitted. *Stevens v. State*, 138 Ala. 71. The question asked witness Leonard called for irrelevant testimony. The defendant's character for honesty was not in issue. *Koch v. State*, 115 Ala. 99, nor was the character of his parents involved. The argument of the solicitor was proper, as the statement was merely the legal effect of a showing. The depositions and showings were properly not allowed to go to the jury.—*Bates v. Prevle*, 150 U. S. 148; *Stoudemire v. Harper*, 81 Ala. 242. Charges 1, 2 and 3 were properly refused.—*Devall v. State*, 63 Ala. 12; *Jones v. State*, 115 Ala. 83; *Coffin v. U. S.*, 156 U. S. 432. All of the charges were bad.—*Mann v. State*, 134 Ala. 1; *Liner v. State*, 124 Ala. 1; *Cawley v. State*, 133 Ala. 128; *Crawford v. State*, 112 Ala. 1.

DENSON, J.—The indictment in this case was for murder in the first degree, and was returned into the court on the 23rd of January, 1904. On the 20th of February, 1904 the defendant was duly and legally arraigned upon the indictment and pleaded not guilty, and the 7th day of March, 1904, was set as the day for the trial, and on that day, the defendant presented for the first time, a motion in writing to quash the indictment. This motion was overruled.

The defendant then filed a plea in abatement to the indictment. The averments in the plea, upon which the quashing of the indictment was prayed for, are the same as those contained in the motion to quash. A demurrer by the State to the plea was sustained, whereupon the defendant demurred to the indictment and the demurrers were overruled.

The motion, plea in abatement and demurrer to the indictment having been filed after the defendant had pleaded to the merits of the case, it is insisted here by the appellee, that they were filed too late, and that the court's ruling upon them should be upheld for that reason.

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It is undoubtedly the law, that after the defendant has upon arraignment, entered a plea of not guilty to the indictment, dilatory pleas cannot, as matter of right, be filed, and if filed without permission of the court, the court on motion could properly strike them.—*Jacksons' case*, 74 Ala. 26; *Hortons' case*, 47 Ala. 58; *Davis' case*, 131 Ala. 10; *Oakleys' case*, 135 Ala. 15.

But, the court may, in the exercise of its discretion permit the withdrawl of the plea to the merits and allow the filing of such pleas as are contained in this record. And, while the minute entry in this case, does not show in express terms, that permission was asked by and given to the defendant, to withdraw the plea to the merits for the purpose of filing the motion, plea and demurrer, it does show that they were ordered by the court to be filed and made a part of the record, that the motion was submitted to the court and overruled, that the plea was demurred to by the solicitor and the demurrer was sustained, and that the demurrer to the indictment was argued by council and the demurrer was overruled. There seems to us no escape from the conclusion that the court in the exercise of its discretion allowed the filing of said pleas, and certainly that the court and solicitor treated them as having been properly filed. Therefore, the insistence that the motion, plea and demurrer cannot be considered, because filed too late is untenable.—*Williams' case*, 3 Stew. 454; *Hubbards' case*, 72 Ala. 164; *Davis' case*, 131 Ala. 10; *Thayers' case* 138 Ala. 39.

A sufficient answer to the attack made upon the action of the court in overruling the motion to quash the indictment is, that the bill of exceptions purports to set out all the evidence, and there is not a scintilla of evidence in it, addressed to the support of the averments contained in the motion.

The question presented by the 1st and 2nd grounds of the plea in abatement has been determined adversely to the defendant in a recent decision rendered by this court, in which the Act of the Legislature, 1900-1, p. 308, which authorizes the employment of a stenographer to attend before the grand jury, when required by the so-

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licitor, to take down and transcribe the testimony of witnesses before that body, was construed. On the authority of that decision we hold that there was no error in sustaining the demurrer to the 1st and 2nd grounds of the plea in abatement.—*Thayers' case*, 138 Ala. 39.

Section 5039 of the Code, provides, that the concurrence of at least twelve grand jurors is necessary to find an indictment. The record in this case shows that the grand jury which returned the indictment was composed of seventeen persons. For aught that appears in the plea, sixteen of the grand jurors heard the evidence and voted upon it to find the indictment, therefore, the demurrer to the third and fourth grounds of the plea was well sustained. It would also seem, that the plea in abatement, in so far as the 3rd and 4th grounds are concerned, fell within the express provisions of section 5269 of the Code, and for that reason might properly have been stricken from the file or demurred to.

Upon an examination of the indictment in the case of *King v. State*, 137 Ala. 47, we find that it is strikingly similar in its averments, to the indictment in the case under consideration, indeed, it would be hard to differentiate the two. In that case a similar demurrer to the one interposed to the indictment in the case here, was interposed to the indictment, and the judgment of the court in overruling the demurrer was upheld. We are satisfied with the reasoning employed and the conclusion reached in *Kings' case, supra*, and hold that there was no error in overruling the demurrer to the indictment.

Many exceptions were reserved to the rulings of the court on the admissibility of evidence.

On cross-examination, the defendant's counsel asked Dr. E. P. Lacey, the first witness who was examined in behalf of the State, this question: "Was he (the deceased) a man who drank a good deal?" The court sustained an objection to the question. A similar question was asked of Dr. Donald, and objection sustained to it. Nothing had been developed by the evidence at the time the questions were asked, which even hinted at self-defense, or any other issue which might have rendered the

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evidence sought to be elicited by the questions, relevant. The court committed no error in sustaining the objections made to the questions asked of the said witness.—*Gregorys' case*, 37 So. Rep. 259. Furthermore, the question asked of Dr. Lacey implied an answer which related alone to the deceased's habits, and not to his status on the day, and at the time that the fatal blow was given. And the question asked Dr. Donald related to the condition of the deceased on the day before the difficulty.

The witness George Roberts, for the State, on direct examination, testified *inter alia*, that he saw the deceased in Etter's saloon, just before he received the injury which resulted in his death, and that he was "drinking heavily." On cross-examination the witness was asked; "What was deceased's conduct in the saloon tending to show that he was drunk or sober?" The court on objection made by the State declined to allow the witness to answer the question. It appearing from the bill of exceptions, that the statement of the witness, that the deceased was "drinking heavily," was given by the witness on the examination in chief by the State, it was the right of the defendant on cross-examination to have the witness state before the jury, the facts upon which the statement, that the deceased was "drinking heavily," was predicated. It follows that the court erred in sustaining the objection to the question.

Whether or not Conniff (the deceased) was in the saloon the day previous to the day on which he was killed, was manifestly immaterial, and its materiality not having been made to appear by any thing which preceded the asking of the question of witness Etter, by which it was sought to bring out that fact, the court did not err in sustaining the solicitor's objection to the question.

On cross-examination of witness Roberts, the defendant's counsel asked him, "did he (Conniff) do any thing unusual just before he was hurt in the saloon?" On objection of the solicitor the court refused to allow the witness to answer the question. The record is silent as to what answer from the witness was expected, so that

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this court cannot pass intelligently on the ruling. Furthermore, the question was so general that irrelevant evidence would have been responsive to it.—*Ross' case*, 139 Ala. 144; *Tolbert's case*, 87 Ala. 27.

The seventh, eighth and ninth grounds of the assignment of errors relate to the court's action in sustaining objections to questions asked by the defendant of the witness Roberts, by which he sought to elicit evidence of the deceased's conduct towards the witness and others than the defendant, in the saloon just before deceased went back into the wine room where he received the fatal blow. There was nothing in the evidence at the time the question was asked and objection sustained to them, which such conduct on the part of the deceased, would have illustrated to the benefit of the defendant. The evidence sought was patently irrelevant and immaterial, and the court did not err in sustaining the objections to the questions.

Witness Leonard, the officer into whose custody the defendant was delivered by Etter soon after the deceased received the blow, after testifying that he never made any threats against defendant; nor made him any promises, nor offered him any inducements to make any statement, and that no one else did in his presence, was allowed, against a general objection made by the defendant, to testify, that, "the defendant said that he (the defendant) struck Conniff because Conniff was beating him with one of these pieces of kindling, and that he struck deceased with a hatchet." If it be conceded that the statement made by the defendant was a confession, tested by the former rulings of this court, a sufficient predicate was laid for the admission of the confession. *Thayer's case, supra, Steven's case*, 138 Ala. 71.

The 11, 12, 13, 14, 15, 16, 24 and 25 grounds in the assignment of errors relate to the same subject-matter and may be disposed of together: If it should be conceded, that the facts, which the defendant, by the questions propounded to witnesses Leonard and Gray, attempted to bring out, would have been competent if they had existed prior to or contemporaneously with the making of the statement by the defendant, such prior

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or contemporaneous existence must have been shown in order to put the court in error, in sustaining the objections to the questions. So far as the record shows, the statement testified to, was made before any of the matters inquired about occurred.—*Dodson's case*, 86 Ala. 60.

The defendant's character for honesty was not in issue, and the court properly sustained the solicitor's objection to the interrogatory calling for such evidence. *Davenport's case*, 85 Ala. 336; *Funderberg's case*, 100 Ala. 36; *Walker's case*, 91 Ala. 76.

The character of the defendant's parents was not in any respect, involved in the issues in this case, and whether good or bad, was not a proper subject of inquiry. Objections to the interrogatories calling for such evidence were properly sustained by the trial court. *Kochs' case*, 115 Ala. 99.

The only phase of the deceased's character, which was in issue, was that pertaining to peace and quietude. The defendant offered testimony tending to show that the deceased's character for peace and quietude was not good, but that when drinking he was a turbulent, quarrelsome and dangerous man.

The fact, if it was a fact, that deceased claimed to have been robbed, would have had no tendency to prove that he was not a person who maintained a good character for peace and quietude. Hence, questions asked State's witnesses Houston and Crawford by defendant were improper, and the court correctly sustained the objections made to them.

There is no merit in the exception reserved to the action of the court in declining to exclude from the jury the statement of the solicitor made in his argument to the jury, with reference to the showings made by the defendant as to the absent witnesses, which showings were offered in evidence. The statement made was in keeping with the legal effect of such showings.

Certain witnesses for defendant were absent, the defendant's counsel wrote out showing of what the evidence of such witnesses would be if they were present. The solicitor admitted the showings with objections to certain parts of them, the parts objected to were indi-

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cated by brackets. The depositions of certain witnesses were taken by the defendant, and to certain parts of the depositions, the solicitor objected, and those parts were indicated by brackets being marked around them. The court sustained the objections made to the showings and depositions, and the parts not objected to were read to the jury as evidence. The defendant insisted that the jury should be allowed to carry the showings and the depositions with them and have them during their consideration of the case. Upon objection being made by the solicitor the court declined to allow the showings and depositions to be carried out by the jury. The bill of exceptions shows that the portions of the showings and depositions which were not ruled out were read to the jury as evidence. By this method defendant received full benefit of such evidence. If the showings and depositions had been carried out by the jury, they would not only have had the legal evidence embraced in them, but also that which the court declared was illegal.

Section 1834 of the Code, provides, that depositions taken in accordance with the sections preceding that section, relating to the taking of depositions of witnesses, may be read in evidence so far as the same are pertinent to the issue. Section 1834 relates to depositions taken in civil cases. Section 5292 of the Code provides, that depositions taken in criminal cases are governed by the same rules that are applicable to depositions taken in civil cases at law. It further provides, that no deposition can be read in evidence on the trial, if it appears that the witness is alive, and able to attend court and within the jurisdiction of the court.

From the language of the two statutes, it would seem that it was not contemplated by the law-making body, that depositions are to be taken by the jury to their rooms and used by them in their deliberations, but that they are to be read, and the evidence of witnesses taken by depositions shall thereby be put upon the same footing as the evidence of witnesses examined *ore tenus*, no higher and no lower.

We cannot construe the language of the statutes so as to make it a matter of right on the part of the defend-

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ant to have the jury take the written depositions with them for use in their deliberations upon the case, without doing violence to that language. It is at most, a matter of discretion with the court as to whether the depositions should be carried out by the jury.

"A deposition which has been read in evidence may be given to the jury when they retire to make up the verdict, if it contains no inadmissible testimony, or if the inadmissible testimony is eliminated therefrom."—Ency. Pl. & Pr. Vol. 6, § 24, p. 586.

In New Hampshire it has been held that, "where a deposition is in part incompetent it cannot be passed to the jury."—*Smith v. Nashua, etc. R. Co.*, 27 N. H. 100; *Shute v. Robinson*, 41 N. H. 308.

There was no error, under the facts in this case, in the rulings of the court with respect to the showings and depositions.

When an indictment alleges the means by which a homicide was committed, in the alternative, each alternative averment must be construed as a separate count.—*Thomas' case*, 111 Ala. 51; *Kings' case*.

The first count in the indictment in this case then, charges that the killing was effected by the defendant hitting the deceased with a hatchet; the second by striking him with a hatchet, while the third count alleges that the killing was done with some blunt instrument to the grand jury unknown. This mode of pleading is expressly allowed by statute.—Sections 4906 and 4911 of the Code; *James' case*, 115 Ala. 83; *Kings' case*, 137 Ala. 47.

If the only averment in the indictment, as to the means, or instrument with which the killing was done had been, that it was unknown to the grand jury, and the proof had shown, that the means were known to the grand jury from the evidence that was submitted to them, this state of the case would present a variance between averment and proof, which would have warranted the court in giving charges like those numbered 1 and 2 asked for by defendant and which were refused, but not charge numbered 3. But under an indictment like the one here, and where the proof shows the killing was done with a hatchet, the instrument alleged in two of

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the counts, the principle invoked by the charges numbered 1 and 2 respectively, has no application, unless limited to the count containing the averment that the means were unknown. There was no error in refusing charges 1, 2 and 3.—*Dorseys' case*, 134 Ala. 553; *James' case*, *supra*; *Duval and Pedhams' case*, 63 Ala. 18; *Terrys' case*, 118 Ala. 79.

Consideration of charge numbered 5 is made unnecessary by the verdict of the jury.

Refused charges 4 and 6, clearly invade the province of the jury and the court properly refused them.—*Bells' case*, 37 So. Rep. 281.

Charge 12, requested by the defendant, has been repeatedly condemned by this court.—*Averys' case*, 124 Ala. 20; *Cawleys' case*, 133 Ala. 128; *Bells' case*, 37 So. Rep. 281.

The indictment is in Code form and embraces all of the degrees of homicide, and the defendant under it, might have been convicted of manslaughter, if the jury had concluded that the evidence warranted a conviction for that offense. Hence, the court was correct in refusing charge numbered 16.—*Stoballs' case*, 116 Ala. 454; *Thompsons' case*, 131 Ala. 18; *Littletons' case*, 128 Ala. 31.

One of the indispensable elements of self-defense is, freedom from fault, and the law admits of no qualification of the requirement. Charges containing the expression, reasonably without fault in bringing on the difficulty, are erroneous and are properly refused. Refused charges 19 and 20 in the series of charges asked by the defendant are of the character above named, and the court committed no error in refusing them.—*McQueens' case*, 103 Ala. 12; *Johnsons' case*, 102 Ala. 1; *Howards' case*, 110 Ala. 92; *Crawfords' case*, 112 Ala. 1.

Charge 1 requested by the defendant, failed to set forth the constituents of self-defense and for this reason, if for no other, was properly refused.—*Miller's case*, 107 Ala. 40; *Mann's case*, 134 Ala. 1.

For the error pointed out, the judgment of conviction is reversed and the cause is remanded.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DOWDELL, J. J., concurring.

[Adcock v. The State.]

Adcock v. The State.*Indictment for Public Drunkenness.*

1. *Constitutional law; statute to regulate practice and procedure in the Circuit Court of Clay county unconstitutional.*—The provisions of the Act approved December 13th, 1898, "To further regulate the practice and procedure of the Circuit Court of Clay county," whereby it was intended to deprive that court of jurisdiction to try indictments thereafter returned into that court, and to deprive that court of a grand jury except when the same should be ordered by the judge of said court prior to the convening of said court (Local Acts 1898-99 p. 196), are violative of Section 5 of Article VI. of the Constitution of 1875 (Constitution 1901, § 143) and are therefore inoperative and void.

APPEAL from the Circuit Court of Clay.

Tried before the HON. JOHN PELHAM.

The appellant in this case was indicted, tried and convicted of public drunkenness. The indictment under which the conviction was had was preferred by a grand jury organized by the circuit court of Clay County at the spring term of said court in 1904.

The only question presented by the record is whether the acts "To establish a county court for the county of Clay," (Local Acts 1898-9, p. 176) and "to further regulate the practice and procedure of the circuit court of Clay county, Alabama," (Local Acts 1898-9, p. 196) are repealed by the act passed at the last session of the legislature, purporting to repeal the acts above referred to, and other acts relating to the same subject.—Local Acts 1903, p. 255. Before the court convened no order was made by the judge summoning a grand jury as directed by section one of the act, "To further regulate the practice and procedure of the circuit court of Clay county," the judge acting upon the idea that this act was repealed by the act last referred to. The appellant filed a motion to quash the indictment, to transfer the cause to the

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county court, and filed pleas in abatement, all upon the theory that the act of 1903 was unconstitutional in whole or in part entitling him to be tried in the county court under former acts.

The lower court overruled appellant's several motions and "overruled his pleas in abatement," thus holding that the act of 1903 was a valid enactment and repealed the former acts.

No counsel marked as appearing for appellant.

MASSEY WILSON, Attorney-General, for the State, cited *City Council v. B. & L. Assn.*, 108 Ala. 336; *Bradley v. State*, 99 Ala. 177; *State v. Davis*, 130 Ala. 148; *Riggs v. Breuer*, 64 Ala. 282; *Watson v. Kent*, 78 Ala. 602.

MCCLELLAN, C. J.—In this case, the court holds that the provisions of the act of December 13, 1898, "To further regulate the practice and procedure of the circuit court of Clay county," whereby it was intended to deprive that court of jurisdiction to try indictments thereafter returned into that court and to deprive that court of a grand jury except when the same should be ordered by the judge of the court prior to the convention of the court, were violative of section 5 of article 6 of the Constitution of 1875, (Const. 1901, § 143) and are, therefore, imperative. It follows that the indictment in this case was returned by a duly constituted grand jury, and the circuit court had jurisdiction to try the defendant thereunder, notwithstanding the existence and statutory jurisdiction of the special county court of Clay county to try indictments transferred to it *by consent* from the circuit court (and also indictments returned into the county court by its own grand jury of course) under the act of December 13, 1898, creating said county court.

The judgment of the circuit court must, therefore, be affirmed.

Affirmed.

HARALSON, TYSON, DOWDELL, SIMPSON, ANDERSON and DENSON, J.J., concurring.

[Walker v. The State.]

Walker v. The State.*Indictment for Murder.*

1. *Judgment of conviction; void when rendered on day court not authorized to sit.*—The judgment of conviction in a criminal case which is rendered upon a day when the court is not legally in session, and at a term when the court is not authorized to sit, is void, and an appeal from such judgment will be dismissed.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. PAUL SPEAKE.

The appellant in this case, Minerva Walker, was indicted for murder, was convicted of murder in the first degree, and sentenced to the penitentiary for life.

The indictment was preferred by the grand jury of the circuit court of Madison county at the February term of 1904, of said court, and the case was tried at the same term of the court.

W. R. WALKER, for appellant.

MASSEY WILSON, Attorney-General, for the State.

TYSON, J.—The indictment was preferred by a grand jury organized by the Hon. Paul Speake, whom we have held was a *de facto judge*, and at a time when the court could be held. It is, therefore, valid. The trial and conviction, however, were had upon a day when the court was not legally in session. The judgment of conviction is, therefore, void.

Appeal dismissed.

HARALSON, SIMPSON and ANDERSON, J.J., concurring.

[Weaver v. The State.]

Weaver v. The State.

Indictment for Seduction.

1. *Seduction; evidence, when admissible.*—On a trial under an indictment for seduction where there is evidence that the commission of the offense was procured by means of a promise of marriage, it is competent for the prosecutrix to testify that the defendant told her that he loved her.
2. *Same; immaterial testimony.*—In such a case it was not material whether the child of the prosecutrix was born and the promise made in the county where the prosecution was begun.
3. *Same; when evidence admissible as bearing on promise of marriage.*—In such a case, the brother of the prosecutrix may testify that he heard the defendant tell the prosecutrix that he loved her, as such testimony tends to corroborate her on this point and was a circumstance which with others might authorize the jury to believe that he was leading her to believe that he was going to marry her.
4. *Same; evidence of flight.*—In such a case, it may be shown that the defendant was not in the community where the prosecutrix lived, after the offense was committed, until brought back to answer the indictment, as tending to show that he realized his danger after learning of her condition.
5. *Same; admissibility of letters from defendant to prosecutrix.*—In such a case, letters written by the defendant to the prosecutrix after the commission of the offense, and received by her through the usual channels, are admissible, as tending to show the relations that had existed between them.
6. *Same; argument of counsel.*—In such a case, remarks of the solicitor to the jury on the word "beast" used in a letter received by the prosecutrix from defendant, in the place of "best," that the defendant characterized himself by the use of the word "beast," are mere expressions of opinion, and unobjectionable.
7. *Same; charge to jury.*—In such a case, where there is evidence that the prosecutrix yielded to the defendant as the result of a promise of marriage, a charge which instructs the jury that "if the evidence satisfies you beyond a reasonable doubt that Mollie Jerkins surrendered her virtue and had sexual intercourse with defendant as a result of a promise of marriage made to her by defendant, but that said promise was made by

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defendant and said Mollie Jerkins surrendered her virtue in 1898, then your verdict must be for the defendant," is properly refused as she may have surrendered her virtue in 1898 and yet if she yielded to him in 1901 she would be entitled to the protection of the statute.

8. *Same; same; chastity of prosecutrix.*—In such a case a charge is erroneous which instructs the jury to find the defendant not guilty if he had intercourse with the prosecutrix prior to the time mentioned by her, as she may have been mistaken in the exact date and if she had previously fallen she may have reformed and if she then yielded to him under promise of marriage she would be entitled to the protection of the statute.
9. *Same; same; same.*—In such a case, a charge is erroneous which instructs the jury that they could infer the unchastity of the prosecutrix because the State did not produce testimony as to her character.
10. *Same; same; corroboration of prosecutrix.*—In such a case, where there was evidence that defendant was overheard to tell the prosecutrix that he loved her, that he visited her frequently for several years, that after the commission of the offence he left the community, that he wrote letters to her containing acknowledgments of his relations with her and of his promise of marriage, the jury might have found that the prosecutrix was corroborated within the requirements of the statute, and a charge instructing the jury to acquit the defendant for want of such corroboration, is properly refused.
11. *Same; same.*—In such a case a charge is properly refused which instructs the jury to acquit the defendant unless the prosecutrix yielded on account of a promise of marriage where the jury might have found that she yielded as the result of "arts" or "flattery."
12. *Same; same; corroboration of prosecutrix.*—In such a case it is not necessary for the prosecutrix to be corroborated by other testimony as to the promise of marriage and it is sufficient if she is corroborated as to either of the material facts so as to satisfy the jury that she was worthy of credit.
13. *Same; same.*—Charges which are contradictory, confusing or involved are properly refused.
14. *Same; same; willingness of prosecutrix.*—In such a case, a charge is properly refused which instructs the jury to find the defendant not guilty if the prosecutrix was willing to commit the offence, since such willingness may have been the result of his arts or flattery.

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16. *Motion in arrest of judgment; when properly overruled.*—Irregularities in the formation of the jury are waived if not objected to before the trial is entered upon, and a motion in arrest of judgment because of such irregularities, is properly overruled.
15. *Motion in arrest of judgment; when properly overruled.*—Irregularities in the formation of the jury are waived if not objected to before the trial is entered upon, and a motion in arrest of judgment because of such irregularities, is properly overruled.

APPEAL from Conecuh Circuit Court.

Tried before the Hon. J. C. RICHARDSON.

The appellant, Colonel Weaver, was indicted, tried and convicted for the seduction of Mollie Jerkins, "by means of temptations, arts, flattery or a promise of marriage," and his punishment fixed at six years imprisonment in the penitentiary.

The evidence for the State tended to show that Mollie Jerkins, a young woman, was at the time of the trial the mother of a child, born in November, 1902, of which the defendant was the father; that she and defendant became acquainted with each other in 1899, and from that time until August, 1902, were together frequently; that in November, 1901, she made him a promise of marriage and soon afterwards had sexual intercourse with him for the first time, and continued to do so until August, 1902, when she informed defendant that she was in family way and requested him to keep his promise to marry her, which he declined to do and left the community and did not return until he was arrested and brought back under the present indictment.

The evidence for the defendant tended to show that the defendant was sick and confined to his father's house with measles from February 1, 1902, until March 15, 1902, and that he did not go to see Mollie Jerkins during that time; and the defendant testified in substance that in 1898 he and the prosecutrix became engaged to marry, but this engagement was broken in September of that year, and nothing afterwards was ever said between them on that subject; that afterwards and until August, 1902, he frequently had intercourse with her, except during the months of February and March, 1902, when he

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was sick with measles; that he was not the father of the child, and that he left the community in August, 1902, when informed that she was in a family way; that he wrote the letters offered in evidence by the State, to the prosecutrix.

On the examination of Mollie Jerkins, the prosecutrix, she was asked by the solicitor, "Was it in Conecuh county that the baby was born, and the promise to marry made, and sexual intercourse had?" to which the defendant objected, the court overruled the objection and defendant excepted. The witness answered, "Yes, it all happened in Conecuh county."

John Jerkins, a brother of the prosecutrix, testifying for the State, stated that he heard defendant "tell her one night in 1901 he loved her," to which the defendant objected, the court overruled the objection and defendant excepted.

J. P. Jerkins, father of the prosecutrix, testifying for the State, was asked by the solicitor whether he had seen the defendant in that community after August, 1902, to which the defendant objected, the court overruled the objection and defendant excepted. The witness answered no, not until he was brought back.

On the further examination of the prosecutrix she testified that after the defendant left the community she received letters from him; that she knew his handwriting, and that the letters were written by him, and that they were received, some by mail and some from members of defendant's family. The State offered the letters in evidence, the defendant objected, the court overruled the objection and defendant excepted.

The letters were lengthy and contained many references to the relations between them and allusions to his promise to marry her.

One of the letters admitted was signed "Your beast friend." In his argument to the jury the solicitor stated that the defendant characterized the sort of a friend he was to the prosecutrix when he signed the letter in that manner. The defendant objected to the argument and moved to exclude the same from the jury, the court

overruled the objection and motion and defendant excepted.

Upon the introduction of all the evidence the defendant requested the following charges, which the court refused and he excepted: "The court charges the jury that if the evidence satisfies you beyond a reasonable doubt that Mollie Jerkins surrendered her virtue and had sexual intercourse with defendant as a result of a promise of marriage made to her by defendant, but that said promise was made by defendant and said Mollie Jerkins surrendered her virtue in 1898, then your verdict must be for defendant." "The court charges the jury that if you believe from the evidence that Mollie Jerkins had illicit intercourse with the defendant in this case prior to the first Thursday after Christmas, 1901, and at a time prior to date she swore she first had sexual connection with defendant, then said Mollie Jerkins was not on said first Thursday after Christmas a chaste woman, and your verdict must be for defendant." (f). "The court charges the jury that when the defendant offered evidence tending to prove that Mollie Jerkins was an unchaste woman at the time of the alleged offence, it was permissible for the State to offer evidence as to the general character of Mollie Jenkins for chastity, and the failure of the State to offer such evidence is a circumstance you can look to in determining whether or not Mollie Jerkins was a chaste woman at the time of the alleged seduction." (h). "The court charges the jury that the evidence in this case does not show such a corroboration of the testimony of Mollie Jerkins as will authorize a verdict against the defendant." "The court charges the jury that though you may believe from the evidence that the defendant and Mollie Jerkins were engaged to be married and they had sexual intercourse, that this is not sufficient to convict the defendant unless you believe from the evidence beyond all reasonable doubt that Mollie Jerkins yielded to the sexual intercourse on account of the promise of marriage, and this fact of the promise of marriage is corroborated by another witness or witnesses in the case, and was the proximate cause of her yielding to the sexual intercourse, then you must find the defendant not guilty. (3d). "If you believe from the evidence in the case that

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Mollie Jerkins was as willing, or as much willing, as the defendant to the sexual intercourse, or you have a reasonable doubt on this subject, after looking at all the evidence in the case, or unless the State or all the evidence on this subject, after considering the evidence as a whole, so convince you beyond all reasonable doubt that Mollie Jerkins did not yield to the sexual intercourse to gratify her own passions and desires, then you must find the defendant not guilty." (4th). "If you believe from the evidence in the case that Mollie Jerkins, the prosecutrix, was more or as willing as the defendant to have sexual intercourse, and they did have sexual intercourse under these circumstances, then your verdict must be for the defendant, and you must find him not guilty." (5th). "The presumption of innocence is with the defendant when he enters upon his trial, and follows him all through the trial until his guilt is established as charged in the indictment, and until that is done he, the defendant, need not say anything. Mathematical certainty is not required, because all questions are subject to some degree of doubt, but this does not mean that you can convict the defendant unless you believe from all the evidence in the case he is guilty and acting on grave concerns of your own, you believe he is guilty beyond all reasonable doubt, and if you do not so believe, you must find him not guilty."

The court, at the instance of the solicitor, gave the following written charge to the jury, to which action the defendant excepted: "The court charges the jury that the written charges read to the jury in this case by the counsel for the defendant are not in conflict with the general oral charge of the court, but only a different manner of stating the law in this case.

After the verdict of the jury was returned into court the defendant moved in arrest of judgment because of irregularities in the drawing and summoning of the jurors. The court overruled the motion.

STALLWORTH & BURNETT and JAS. A. STALLWORTH, for appellant.—The woman was not corroborated and the conviction was wrongful. The woman should not

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have been permitted to testify that the defendant made love to her. The place of the birth of the child was not material. The court erred in receiving the letters in evidence. They had no bearing on defendant's guilt or innocence.

MASSEY WILSON, Attorney-General, for the State,
contra.

SIMPSON, J.—The defendant was convicted of the crime of seduction and appeals to this court.

The first exception is to the action of the court, in overruling the objection to the question by the State to the witness (prosecutrix) "Did he make love to you?" Whatever doubt there may have been as to this question, on the subject of opinion evidence, was relieved by the answer, to-wit: "He told me he loved me," which was clearly competent.

(2). While it was immaterial whether the baby was born and the promise made in Conecuh county, or in some other, we cannot see that the defendant could be prejudiced in any way by the answer to that question.

(3). The testimony of the brother of the prosecutrix, as to hearing defendant tell prosecutrix that he loved her, was properly admitted, as it tended to corroborate her testimony on that point, and was a circumstance, which, with others, might authorize the jury to conclude that defendant was leading the girl to believe that he was going to marry her.

(4). The objection to the question, as to whether the witness had seen the defendant in that community after August, 1902, was not well taken, as, while it was not conclusive, yet it was a circumstance, properly placed before the jury, and tending to show that the defendant realized his danger after learning the condition of the prosecutrix.

(5). The objection to the introduction of the letters was properly overruled. The prosecutrix had testified that she knew defendant's handwriting; that she received them through usual channels, and knew them to be from defendant. As to their matter, although writ-

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ten after the act of seduction, they tended to show the relations that had existed between them, and contained acknowledgments on his part that he had done wrong, and evident allusions to his previous promises to marry her.

(6). The exception to the remarks of the solicitor on the word "beast" (used in the letter in place of "best") was properly overruled, as the remarks were merely expressions of opinion as to the enormity of the defendant's offence.

(7). The first charge requested by the defendant was properly refused. Although she may have surrendered her virtue in 1898, yet she might have yielded to him in 1901, only on promise of marriage, and been entitled to the protection of the statute.—*Suther v. State*, 118 Ala. 88.

(8). The charge requested by defendant, to the effect that if prosecutrix had intercourse with defendant prior to first Thursday after Christmas, 1901, then she was not, on that day a chaste woman, was properly refused, because, 1st, she may have been mistaken in the exact date; 2d, even though she had previously fallen, she may have reformed, and, if she yielded to him then only under promise of marriage, she may have, at that time, had the virtue of chastity * * * within the meaning of the statute, entitling her to its protection." *Suther v. State*, 118 Ala. 88.

(9). The charge marked (f) was properly refused. It would not have been proper for the court to have charged the jury that they could infer the unchastity of the prosecutrix, because the State did not produce testimony as to her character.

(10). The charge marked (h) was properly refused. There was evidence from which the jury might have found that the prosecutrix was corroborated within the requirements of the statute.

(11). While it is true that the mere fact that the parties were engaged to be married and had sexual intercourse is not sufficient to establish the fact that prosecutrix yielded on account of the promise to marry, yet the charge requested on this subject was defective; 1st,

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in the omission of the word "and" between the names of defendant and Mollie Jerkins; and, 2d, in that it mentioned the promise of marriage only, as the moving cause, and required the jury to acquit, though they might have found that she yielded as the result of "arts" or "flattery." This charge was also faulty in that it required the jury to acquit, unless the prosecutrix was corroborated, by other testimony as to the promise to marry, whereas this is only one of the material facts, and corroboration as to either of the material facts, so as to satisfy the jury that prosecutrix was worthy of credit, would be sufficient.—*Wilson v. State*, 73 Ala. 527; *Munkers v. State*, 87 Ala. 94; *Suther v. State*, 118 Ala. 88.

(12). The charge numbered 3, (by reason of mistakes in transcribing or otherwise) is so contradictory and involved that it is not possible to pass on it.

(13). Charge numbered 4 was properly refused because, although prosecutrix may have been willing to commit the offense, yet she still may have had sufficient control to have enabled her to resist her own desires as well as the importunities of defendant, until she had the assurance that he was going to marry her, and her willingness may have been the result of his arts of flattery.

(14). Charge number 5 is confusing and unintelligible, (possibly owing to the incorrect transcription).

(15). As the oral charge, given by the court, is not set out, it is impossible for this court to pass upon the correctness of the charge given, at the request of the solicitor.

(16). The motion in arrest of judgment was properly overruled, as any irregularities in the formation of the jury were waived.—*State v. Williams*, 3 Stew. 454; *Thomas v. State*, 94 Ala. 75; *Howard v. State*, 108 Ala. 571.

The judgment of the court is affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

[White v. The State.]

White v. The State.

Indictment for Bigamy.

1. *Appeal from void judgment; should be dismissed.*—Judgment rendered by a court which is held at a time and place unauthorized by law, is void and appeal therefrom will be dismissed.

APPEAL from the Circuit Court of Walker.

Tried before the Hon. JAMES J. RAY.

The appellant in this case, Bob White, was indicted, tried and convicted of bigamy. The indictment was preferred by the grand jury at the spring term, 1903, of the circuit court of Walker county.

Trial was had on September 21, 1903, when Walker county constituted one of the counties in the 14th judicial circuit under the provisions of what was known as the Lusk Law redistricting the circuit courts of the State.

M. L. LEITH, for appellant.

MASSEY WILSON, Attorney-General, for the State.

DENSON, J.—Upon the authority of the case of the *State of Alabama ex rel. Attorney-General v. T. Scott Sayre, Judge, etc.*, and *Henry Walker v. The State of Alabama*, decided at the present term, opinions in MSS., the judgment of this case must be reversed and the cause remanded, to the end that the circuit court may quash the indictment and hold defendant to answer a new indictment.

The defendant will remain in custody until discharged according to law.

Reversed and remanded.

McCLELLAN, C. J., HARALSON, TYSON, DOWDELL, SIMPSON and ANDERSON, J.J., concurring.

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Rehearing granted, order of reversal set aside, and the appeal is dismissed on the authority of the case of *Henry Walker v. State*, decided at the present term.

Kendrick v. The State.

Prosecution for Engaging in the Business of Emigrant Agent without first Obtaining a License.

1. *Constitutional law; engaging in business of emigrant agent without obtaining license.*—The Act of the Legislature, approved October 1, 1903, "to prohibit emigrant agents from plying their vocation within the State without first obtaining a license therefor," is not violative of the 14th amendment of the Constitution of the United States, or of section 31 of the Constitution of Alabama; and said act is, therefore, valid.

APPEAL from the County Court of Elmore.

Tried before the Hon. H. J. LANCASTER.

The facts of the case are sufficiently stated in the opinion.

FRANK W. LULL and EDWIN F. JONES, for appellant, cited *Joseph v. Randolph*, 71 Ala. 499; *State v. Goodwin*, 33 W. Va. 179; *Marion v. Chandler*, 6 Ala. 899; *Ex Parte Burnett*, 30 Ala. 461; *State v. Moore*, 113 N. C. 697.

MASSEY WILSON, Attorney-General, for the State, cited *Capital etc. Co. v. Board of Revenue*, 117 Ala. 303; *Phoenix etc. Co. v. Fire Department*, 117 Ala. 631; *Ex Parte City Council of Montgomery*, 64 Ala. 463; *Osburn v. Mayor*, 44 Ala. 493; *Nathan v. Louisiana*, 8 Howard (U. S.) 73 and notes.

SIMPSON, J.—The defendant (appellant) was tried and convicted of the offense of engaging in or carrying on the business of an emigrant agent, under the statute. Acts 1903, p. 344.

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Appellant's contention is that this act is violative of the XIV amendment to the Constitution of the United States, and also of § 31 of the Constitution of Alabama, providing that "emigration shall not be prohibited."

We hold that, in so far as the XIV amendment to the Constitution of the United States is concerned, the Supreme Court of the United States has settled this question, in favor of the constitutionality of an act requiring a license tax on emigration agents.—*Williams v. Fears*, 179 U. S. 270; see also same case, 35 S. E. Rep. 699.

We do not think that, in so far as this right of the State to require a reasonable license tax is concerned, there was any material difference between that case and the one now under consideration. As said in that case, so in this, under the act in question, "If it can be said to affect the freedom of egress from the State, or the freedom of contract, it is only incidentally and remotely. The individual laborer is left free to come and go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect to that business as other citizens are."—(P. 274-5).

For the same reason it cannot be said that there is any violation of the emigration feature of the Constitution of Alabama.

It is undoubtedly true, as insisted upon by appellant, that the business of an emigration agent, is not one of those occupations which are recognized as so injurious to the public as to justify discriminative legislation, under the police power of the State, with a view of suppressing the same.

The license required, in this case, if sustained at all, must be under the general power to tax occupations, and, as decided by this court in other cases, while it is true that the constitutional provision as to uniformity of taxation does not apply to the license tax on occupations, and while absolute uniformity is unattainable, yet, if there is such great discrimination between members of the same class, in the matter of levying license

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taxes as to indicate an intention to burden and crush out one, it will be declared unconstitutional.

Under our statutes all occupation taxes are evidenced by a receipt which is called a license, so that we do not think that the fact that this is spoken of in the act, as a license, renders the act any the less a tax on the occupation for revenue.

Nor does the fact that it is provided for by a special act, in place of being embodied in the general revenue bill, affect that question. Many items of revenue are included in the general revenue bill, as a matter of convenience, but it is just as competent for the legislature to provide for revenue by separate bills.

We understand the principle to be that the State can divide the various business vocations into classes for the purpose of levying occupation taxes, and levy varying amounts on the different occupations, the limitation being, 1st, That there must be uniformity among members of the same class (and the classification must be reasonable); and 2d, The State cannot levy such an occupation tax on any useful or harmless occupation, as will amount to a prohibition of the same. And, when we say harmless occupation, we do not mean to prescribe an occupation because one man, in the lawful pursuit of it, may draw away business from another, or outrun him in the race for patronage or trade, but harmless in the sense of not being demoralizing in its tendency, injurious to the health of the people, promotive of disorder, or interfering with the rights of other citizens to be protected in their constitutional privileges.

We do not interpret the statute in question as making it an offense for a person living near the border line of the State to employ laborers for service in his own business beyond the limits of the State, as contended by counsel for appellant.

The title of the act, as well as the first section, indicate that it is only the person engaged in the business of an emigrant agent; the second section (which is the one upon which the contention rests) defines an "Emigrant Agent" as "any person *engaged* in hiring," etc., and the fourth section refers only to "any person *doing the business* of an emigrant agent."

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A man who is hiring laborers for himself is not an "agent," and in so hiring he is not "doing the business of an emigrant agent."

The only question then, which remains to be decided in this case is whether or not, in this case, the license tax imposed is so excessive and unreasonable as to amount to a prohibition of the business, or (in the language of the Supreme Court of the United States, in *Lowton v. Steele*, 125 U. S. 137)," under the guise of protecting the public interests, arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon a lawful occupation."

The record in this case does not furnish the court with any data from which it can say that the license tax levied in this case, is so discriminative as to be beyond the constitutional power of the legislature to exact. The amount of the license tax is the same as that sustained by the Supreme Court of Georgia and of the United States in the case of *Williams v. Fears*, *supra*. See also *Ex parte Sykes*, 102 Ala. 173.

The judgment of the court is affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

Skinner v. The State.

Indictment for Assault and Battery.

1. *Indictment; invalid when preferred by grand jury at a time not legally held.*—An indictment which is preferred by a grand jury organized at a term of the Circuit Court which is held at a time not authorized by law, is void, and will not support a judgment of conviction.

APPEAL from the County Court of Elmore.

Tried before the Hon. H. J. LANCASTER.

The appellant in this case was indicted, tried and convicted for an assault and battery with a weapon. The
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indictment was preferred by the grand jury of the circuit court of Elmore county on March 10, 1904.

No counsel marked as appearing for appellant.

MASSEY WILSON, Attorney-General, for the State.

TYSON, J.—The indictment upon which the defendant was convicted is void, not having been preferred by a grand jury organized at a time when the circuit court for Elmore county could be legally held.—*Kidd v. Burke*, in MS.; *Walker v. State*, in MS.

Of course, without a valid indictment to support the judgment of conviction, the judgment is *coram non jure*.

Reversed and remanded.

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

Tallent v. The State.

Indictment for Selling Property upon which there was a Lien.

1. *Indictment for selling property covered by lien; code form sufficient.*—An indictment for selling personal property covered by a lien, which is in the form prescribed by the Code (Crim. Code, p. 335, form 78), is sufficient and not subject to demurrer.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. J. A. BILBRO.

The appellant in this case was tried and convicted under the following indictment: "The grand jury of said county charge that before the finding of this indictment, I. N. Tallent, whose Christian name is otherwise unknown to the grand jury, with the purpose to hinder, delay or defraud G. K. Appleton, who had a lawful and

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valid claim thereto under a written instrument, to-wit., a mortgage, did sell or remove personal property, to-wit., a shot gun of the value of fifteen dollars, the said I. N. Tallent having at the time a knowledge of the existence of such claim, against the peace and dignity of the State of Alabama." The defendant demurred to the foregoing indictment on the following grounds: 1. "The indictment fails to allege the owner of the property sold or removed. 2. Said indictment fails to charge any offense under the law. 3. It fails to disclose who executed the mortgage that Appleton held." This demurrer was overruled.

Upon the introduction of the evidence, the defendant, among other charges, requested the court to give to the jury the following written charge: "If the jury believe all the evidence, they must find the defendant not guilty." The court refused to give this charge, and the defendant separately excepted.

No counsel marked as appearing for appellant.

MASSEY WILSON, Attorney-General, for the State.

SIMPSON, J.—The indictment in this case, is in the form prescribed, Criminal Code, p. 335, and the demurrer to the same was properly overruled.

The court erred in refusing to give the general charge in favor of the defendant, as there was no evidence that the defendant either removed or sold the gun in question.—Code of Ala. § 4757.

The judgment of the court is reversed and the cause remanded.

MCCLELLAN, C.J., TYSON and ANDERSON, J.J., concurring.

[Dickens v. The State.]

Dickens v. The State.

Indictment for the Larceny of Crude Turpentine.

1. *Pleading and practice; how exceptions reserved considered on appeal.*—A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted.
2. *Larceny; crude turpentine subject of larceny.*—Crude turpentine which has run from the top of a pine tree into boxes which were cut into the tree to serve as receptacles for the turpentine, is, while in such boxes, the subject of larceny.
3. *Larceny of crude turpentine; when evil intent and felonious taking a question for the jury.*—On a trial under an indictment for the larceny of crude turpentine while in the boxes cut into the trees, where there was evidence tending to show that the defendant was dipping turpentine for a third party, and that he was not beyond the line of the property owned by such third party, and that the turpentine was taken from the boxes by the defendant in the day time, the question of evil intent and felonious taking which are ingredients of larceny, is a question for the jury, and the general affirmative charge requested by the defendant is properly refused.

APPEAL from the Circuit Court of Houston.

Tried before the Hon. H. A. PEARCE.

The appellant in this case, Ed Dickens, was indicted, tried and convicted of larceny of three gallons of crude turpentine.

The facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence the defendant requested several charges. The recital of the bill of exceptions as to the request for these charges, and the charges themselves, were as follows: (1). "If the jury believe the evidence they will acquit the defendant." (2). "The court charges the jury that crude gum in the boxes is real property, and unless the jury believe from all the evidence beyond a reasonable doubt, that the defendant, after the severance, feloniously took and

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carried away the property, then they must acquit the defendant." (3.) "If the jury believe the evidence, they will find the defendant not guilty."

W. L. LEE, for appellant.

MASSEY WILSON, Attorney-General, for the State, cited *State v. Moore*, 11 Ired. (33 N. C.) 70; *State v. King*, 98 N. C. 648; *Holly v. State*, 54 Ala. 238; *Sullins v. State*, 53 Ala. 474.

DENSON, J.—The defendant was indicted for the larceny of three gallons of crude turpentine.

E. R. Register, for the State, testified that he owned certain turpentine boxes in Houston county; that the defendant worked some boxes adjoining witness'; that in June, 1903, the defendant and one Ed Ward were on his land; that when witness left for dinner he left some boxes near the line undipped; that when he returned, the boxes had been dipped, and that the gum dipped was worth one dollar and a half; that the defendant was near one box in the attitude of dipping, and witness asked him what he was doing and the defendant walked off. That the defendant in January of 1903, pointed out the line between the boxes and witness' boxes, and that defendant was across the line that he pointed out. That the gum was in the box and the box was a part of the trees and was cut into the trees that year. The witness was asked, "How do you hold the boxes?" He answered by a lease and the lease is in writing. The defendant moved to exclude the answer on the ground that there was higher evidence of the lease, and that it was incompetent, the court overruled the motion, and the defendant excepted.

It does not plainly appear from the bill of exceptions whether or not the above question was asked by the defendant or solicitor. But it does appear from the bill that the witness had just testified that he held by a written lease and had not the lease present, and on motion of the defendant the court excluded the evidence. Then immediately follows in a separate paragraph in the bill,

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the word, "Examination," the question above set out, then the answer of the witness above quoted, and which the court declined to exclude.

"A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted."—*McGhee's case*, 52 Ala. 224; 1 Brick. Dig. 251, § 126. A reasonable construction of the bill of exceptions is, that the question was asked by the defendant and the answer which the defendant moved to exclude was drawn out by that question. Adopting this construction, the court committed no error in overruling the motion to exclude the evidence, for the answer given by the witness was directly responsive to the question, and if it should be conceded that the answer was illegal evidence, yet the court was under no duty to exclude it on motion of the party who introduced it.—*Toliver's case*, 94 Ala. 111; *Wright's case*, 108 Ala. 60.

Ward, a witness for the State, testified that he and the defendant dipped some boxes where Register testified that defendant dipped; that it was just after dinner; that it was on Mr. Pope's land as witness understood the land which defendant was working, and that he was hired by the defendant.

The defendant testified that he dipped the boxes, but that they were the boxes of Mr. Pope and he was working the boxes on halves. That he did in January, 1903, point out the line to Register, and he was not over the line so pointed out. That he remained in the woods and dipped the remainder of the day, and that Register also remained and dipped.

One question presented by the affirmative charge, is, whether or not crude turpentine which had run from the body of the tree above into boxes which were cut into the tree to serve as receptacles for the turpentine, was the subject of larceny. This identical question has never been presented to this court for decision, but we are relieved of difficulty in the decision of it by the fact, that the question was considered by the Supreme Court of North Carolina, in the case of *The State v. William*

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Moore, 11 Ired. 70, and in what appears to us, a well considered opinion by RUFFIN, C. J., the court answered the question in the affirmative. In this opinion the court, after reciting the means by which the turpentine was made to flow, uses this language: "such being the process in this business, it seems clear, that turpentine, when in the boxes in the state to be dipped up, is personality. It no longer forms a part of the tree, but it exists separate from the tree, and has been separated by a process of labor and cultivation. The box, though in the tree, is but a convenient receptacle for the turpentine, after it has been extracted or has been made to exude from the pores, which contained it, while in the tree, as a part of it. When it ceases to be a part of the tree, it necessarily becomes a chattel." This case was reaffirmed and followed in the case of *The State v. King*, 98 N. C. 648. We think the reasoning employed by the eminent jurist in the case from which the above extract was taken is sound, and that the conclusion there reached is correct. We, therefore, hold that the turpentine was the subject of larceny.

If the defendant at the time he dipped the turpentine did it under the honest belief that it was within Pope's land line, and that it belonged to Pope, then the evil intent which is an ingredient of larceny would have been lacking, but this question the court could not properly take away from the jury, and also the question whether or not from all the evidence, the taking of the turpentine was done feloniously, notwithstanding the taking might have been openly done, was properly left for the jury to determine.—*Bonner's case*, 125 Ala. 49; *Talbert's case*, 121 Ala. 33; *Dozier's case*, 130 Ala. 57. It follows that the charges requested by the defendant were properly refused.

Considering the view we have taken of the case, it is unnecessary to determine whether the charges of defendant were presented as an entirety.

No error having been found in the record, the judgment of conviction is affirmed.

Affirmed.

MCCLELLAN, C.J., TYSON and DOWELL, J.J., concurring.

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[Fleming v. The State.]

Fleming v. The State.

Indictment for Gaming.

1. *Construction of act creating city court of Gadsden; rule of practice on appeal; trial by court without jury.*—Under the statute creating and establishing the city court of Gadsden (Acts 1900-01, p. 1298), providing that where a cause is tried by the court without a jury “either party may, by bill of exceptions, also present for review the conclusions and judgment of the court on the evidence,” etc., the appellate court can not review the correctness of the conclusion and judgment of the court upon the evidence, unless it is disclosed in the bill of exceptions that an exception was reserved thereto.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

The appellant in this case was indicted, tried and convicted for gaming. Under the opinion on the present appeal it is unnecessary to set out the facts in detail.

No counsel marked as appearing for appellant.

MASSEY WILSON, Attorney-General, for the State, cited *Denson v. Gray*, 113 Ala. 608; *Ala. etc. Co. v. Garner*, 119 Ala. 70.

ANDERSON, J.—This case was tried by the judge without a jury. There is no error in the record, and the defendant seeks by bill of exceptions to have us review the ruling of the trial judge upon the facts.

Section 15 of the Act of 1900-01, page 1298, declaring the powers and regulating the jurisdiction of the City Court of Gadsden is as follows: “Be it further enacted, That in the trial of any cause at law, either civil or criminal, without a jury in said city court in addition to the question which may be under existing laws, presented to the Supreme Court for review, either party to the civil cause or the defendant in the criminal cause, may by

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bill of exceptions, also present for review the conclusions and judgments of this court on the evidence, and the Supreme Court shall review the same without any presumption in favor of the court below, on the evidence, and if there be error, shall render such judgment in the cause as the court below should have rendered, or reverse and remand the same for further proceedings in the said city court as the supreme court shall deem right."

While the bill of exceptions in this case contains the finding of the judge, it does not show that an exception was taken to the conclusion reached by him. We have often held in construing this section as contained in many acts relating to inferior courts, that where the record failed to show that there was an exception reserved to the conclusion and judgment of the court below on the evidence, this court by the terms of the statute, is without jurisdiction or authority to review the correctness of the conclusion of the judge upon the evidence.—*Denson v. Gray*, 113 Ala. 608; *Ala. Winery Co. v. Garner*, 119 Ala. 70; *Murray v. Monk*, in MS.

The judgment of the city court is affirmed.

MCCLELLAN, C. J., TYSON AND SIMPSON, J. J., concurring.

[Jackson v. The State.]

Jackson v. The State.

Prosecution for Assault and Battery.

1. *Pleading and practice; plea in abatement; effect of recital of judgment entry as to joinder of issue.*—Where a prosecution is commenced by an affidavit or complaint, and the record discloses that a plea in abatement was filed to the affidavit, but it does not show any disposition whatever of the plea, and the judgment entry affirmatively shows that issue was joined upon the plea of not guilty, a judgment of guilty against the defendant is not erroneous upon the ground that it fails to respond to the issue presented by the plea in abatement.

APPEAL from the County Court of Elmore.

Tried before the Hon. H. J. LANCASTER.

The prosecution in this case was commenced by an affidavit purporting to be made before the judge of the county court of Elmore county, charging the appellant, Phill Jackson, with having committed an assault and battery upon one Lindsey Jeter. It is shown by the record that the defendant interposed a plea in abatement to the affidavit and warrant, upon the ground that they were insufficient for the institution of the prosecution. The cause was tried by the court without the intervention of the jury. The bill of exceptions contains the statement that the facts set forth in the plea of abatement were admitted to be true, and upon the question being submitted to the court, said plea in abatement was overruled.

The judgment entry recites as follows: "The defendant being duly arraigned upon the charge, for his plea thereto says he is not guilty. Issue being joined on this plea, a trial is had, and after hearing all the evidence in the case, it is the judgment of the court that the defendant is guilty of assault and battery. It is further considered and adjudged, etc."

No counsel marked as appearing for appellant.

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MASSEY WILSON, Attorney-General, for the State.

TYSON, J.—While the record discloses a plea in abatement to the affidavit, upon which the defendant was arrested and tried, it does not show any disposition whatever of the plea. The judgment entry affirmatively shows that issue was joined upon the plea of not guilty, which excludes any assumption that the issue was joined on the plea in abatement. There is, therefore, no room for the application of the principle that the finding of the court was erroneous in failing to respond to the issue presented by the plea in abatement.—*Dannelley v. State*, 130 Ala. 132, 135.

No error appearing on the record, the judgment of conviction must be affirmed.

Affirmed.

Wester v. The State.

Indictment for Abandoning a Family.

1. *Indictment for abandoning family; wife competent witness.*—The statute making the wife a competent witness against her husband under an indictment for abandoning his family (Acts 1903, p. 32), is not an *ex post facto* law within the meaning of the constitutional provision.
2. *Indictment for abandoning family; admissibility of evidence.*—On a trial under an indictment for abandoning his family, it is not competent for the defendant to ask the witness whether or not he had taken liberties with his wife's person prior to the abandonment.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

The appellant in this case was indicted, tried and convicted for abandoning his family and leaving them in danger of becoming a burden to the public. The indictment was preferred and filed in court on September 26,

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1902. The State introduced Vandy Wester, the wife of the defendant. The defendant objected to the examination of his wife as a witness upon the ground of incompetency. The court overruled the objection, and the defendant duly excepted.

The witness testified that she was married to the defendant on July 21st, 1901, that a baby was born to them on March 31, 1902, and that on April 20, 1902, the defendant carried her and her child to her father's and abandoned them, and had contributed nothing to her support or the support of the child. Jasper Roan, a witness for the State, testified that he had known the defendant's wife for eight or nine years; that during a part of that time he lived in the same community with her, and for a period of three years visited her; that during the last four or five years he had known very little of the defendant's wife. Whereupon the defendant asked the witness the following question: "Did you, during the time you visited her, take any liberties with her person?" The State objected to this question. The court sustained the objection, and the defendant duly excepted. A similar question was asked Luther Jolly, a witness for the defendant. The same objections and rulings were made to this question. Thereupon the court stated to the defendant's attorney: "You may ask the witness if he ever had adulterous intercourse with Vandy Wester." This question was asked, and the witness answered "No."

LEE, LEE & LEE, for appellant.—Cited *Hart v. State*, 40 Ala. 32.

MASSEY WILSON, Attorney-General, for the State.

SIMPSON, J.—There was no error in allowing the wife of the defendant to testify in this case.—Acts, 1903, p. 32.

This act is not an *ex post facto* law, within the meaning of the constitutional provision. "A statute which simply enlarges the class of persons who may be competent to testify, is not *ex post facto* in its application to

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offenses previously committed.”—*Hopt v. People of Utah*, 110 U. S. 575; *Mrous v. State*, (31 Tex. Crim. Rep. 597) 37 Am. St. Rep. 834.

The questions asked the witnesses Jasper Roan and Luther Jolly were leading, and, in addition, while the testimony sought to be elicited, might possibly have been competent in connection with other circumstances tending to prove adultery on the part of defendant's wife, yet, as there was no other testimony tending that way, and the defendant was permitted to ask the witnesses the direct question as to whether they had committed adultery with her, which questions were answered in the negative, there was no error in sustaining the objection to this testimony.

The judgment of the court is affirmed.

MCCLELLAN, C.J., TYSON and ANDERSON, J.J., concurring.

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Prosecution for Carrying Concealed Weapon.

1. *Trial and its incidents; general request for charges by defendant; how reviewed on appeal.*—The recital in bill of exceptions that the defendant “asked the court to give the following charges in writing, to-wit:” followed by four charges numbered consecutively, does not show that the court was separately requested to give each of said charges; and the court cannot be put in error for refusing to give said charges unless there was error in refusing all of them.
2. *Charge of court to jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that before the defendant can be convicted, “each and everyone of you must be persuaded beyond a reasonable doubt to a moral certainty, and to the exclusion of every reasonable hypothesis” of defendant's guilt as charged, is erroneous and properly refused.

[Yeats v. The State.]

APPEAL from the County Court of Coffee.

Tried before Hon. JOHN M. LOFLIN.

The appellant in this case was tried and convicted of carrying a pistol concealed about his person. The facts relating to the ruling of the trial court which is reviewed on the present appeal are sufficiently stated in the opinion.

Among the charges requested by the defendant in the manner as set forth in the opinion was the following: "4. The court charges the jury that each and every one of you must be persuaded beyond all reasonable hypothesis, that the defendant on the occasion testified to by the State's witnesses, had the pistol concealed on his person, or you must acquit the defendant."

SOLLIE & KIRKLAND, for appellant.

MASSEY WILSON, Attorney-General, for the State, cited *Rarden v. Cunningham*, 136 Ala. 263; *Verberg v. State*, 137 Ala. 73; *Kennedy v. State*, 85 Ala. 26; *Jefferson v. State*, 110 Ala. 89.

DENSON, J.—The only question presented for review by the record in this case relates to the refusal by the court to give certain special charges that were requested in writing by the defendant.

The bill of exceptions with reference to the manner in which the charges were presented to the court contains this statement, viz: "This being all the evidence, the defendant after the court had given the general charge to the jury, asked the court to give the following charges in writing, to-wit:" Then follow four charges, numbered 1, 2, 3 and 4, respectively.

In the case of *McGehee v. State*, 52 Ala. 224, the bill of exceptions contained this statement, viz: "The defendant requested the court to give the following charges in writing, which the court refused, and to the refusal of the court to charge as requested, the defendant excepted." Then followed charges numbered from one to four, inclusive. The court construing the bill used the following language: "A bill of exceptions is construed

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most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted. A reasonable construction of the bill of exceptions is, that the charges requested were requested not separately, but as a whole. Adopting this construction, if any one of the charges is erroneous, there was no error in refusing the whole." This rule in construing bills of exceptions has been several times followed.—*Rarden v. Cunningham*, 136 Ala. 263; *Verberg v. State*, 137 Ala. 73; *Bell's case*, 37 Sou. Rep. 281.

Construing the bill of exceptions by the rule above stated, if one of the four charges requested is bad, the court did not err in refusing all of them.

In the case of *Harwell v. Phillips, Buttorff Mfg. Co.*, 123 Ala. 464, cited by counsel for appellant, the only question there determined by the court is that it is unnecessary to reserve exceptions to the giving or refusal of written charges, as the statute (§ 613 of the Code of 1896), dispenses with the necessity to reserve exceptions to such rulings, consequently that case is not in conflict with what we have said above.

Charge numbered 4 is bad, in that it required an acquittal of the defendant upon a failure of *any one* of the jurors to be convinced of defendant's guilt beyond a reasonable doubt.—*Hale's case*, 122 Ala. 85; *Goldsmith's case*, 105 Ala. 8; *Cunningham's case*, 117 Ala. 59.

There is no error in the record, and the judgment of the court is affirmed.

MCCLELLAN, C.J., HARALSON and DOWDELL, J.J., concurring.

[State v. Johns.]

State v. Johns.*Habeas Corpus Proceedings.*

1. *Indictment; insufficiency of charge of adultery.*—An indictment which charges that the defendant, “a man did live with * * * a woman, against the peace and dignity of the State of Alabama,” charges no offense against the laws of this State.

APPEAL from Order of Probate Judge of Clay County.
Heard before the Hon. F. J. INGRAM.

The facts of the case are sufficiently stated in the opinion.

No counsel marked as appearing for appellee.

MASSEY WILSON, Attorney-General, for the State.

TYSON, J.—The appeal in this case is by the solicitor from an order of the judge of probate discharging the petitioner on writ of *habeas corpus*, on the ground that the indictment for which the warrant for his arrest was issued charges no offense known to the law.

The indictment and warrant are both shown in the return of the sheriff in answer to the mandate issued upon the petition.

The indictment simply charges that the petitioner, a man, did live with Mollie Sorrell, a woman, against the peace and dignity of the State of Alabama. Clearly, no offense against the law is here charged.

“A court can punish for no act except what is made criminal by law; it has no power to punish for something unknown to the law. It has jurisdiction to try and punish only certain offenses, and those must be made criminal by law. If an indictment shows no offense, there is no criminality shown, and there is nothing of which a court can take jurisdiction. And if a court

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have no jurisdiction its action is void—a condition which is the very object of *habeas corpus* to cure. Voidable informalities or irregularities are not reached by it, but fatal jurisdictional defects are ever within its range, either before or after indictment, and even after conviction and judgment.—Note 1 to § 245 in Church on Habeas Corpus; 15 Am. & Eng. Ency. Law, (2d ed.) 200.

Affirmed.

MCCLELLAN, C.J., SIMPSON and ANDERSON, J.J., concurring.

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Habeas Corpus Proceedings.

1. *Act creating Houston County; notice of intention to apply for the passage of the law creating said county sufficient.*—The notice given of the intention to apply to the Legislature of the State of Alabama of 1903, for the passage of a law creating a new county out of portions of Henry, Dale and Geneva Counties, was sufficient under Section 106 of the Constitution, and was not subject to constitutional objections, because it failed to state the boundaries of the new county, as defined and fixed in the act.

APPEAL from the Order of the Judge of the Twelfth Judicial Circuit.

Heard before the Hon. H. A. PEARCE.

The appellant in this case, Gus Law, was arrested and imprisoned in the county jail of Houston county, by virtue of a warrant issued by the Hon. George Leslie, who was the judge of probate and county judge of said county. While so imprisoned, the said Law filed his petition addressed to the Hon. H. A. Pierce, judge of the 12th judicial circuit, for a writ of habeas corpus, for the purpose of being discharged from such imprisonment. The grounds of the discharge, as set forth in the petition,

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was that the act of the legislature of Alabama of 1903, creating Houston county, was unconstitutional and void in that said act was a local act, and that the notice given of the intention to introduce the act creating said Houston county in the legislature was insufficient and not such notice as required by Section 106 of the Constitution of 1901.

Upon the hearing of the *habeas corpus* the petition was dismissed and the prisoner was remanded to the custody of the sheriff of Houston county. From this judgment and order the petitioner appeals.

R. D. CRAWFORD, for appellant, cited *Wallace v. Board of Revenue*, 37 So. Rep. 323.

MASSEY WILSON, Attorney-General, and ESPEY & FARMER, for the State.

DOWDELL, J.—The principal, and we might say, the only question presented for our consideration and determination, is one that involves the validity of the act of the legislature creating the new county of Houston.

The only insistence against the validity of the act, is based upon the theory of a failure to give the notice as required in § 106 of the Constitution. And that such failure to comply with the requirements of said section as to notice, consisted in the omission to state the substance of the proposed law in the notice that was given. The sole question then is, did the notice which was given contain a statement of the substance of the proposed law, or in other words, was the statement of the substance of the proposed law as contained in the given notice within the contemplation of the constitutional provision. It is not questioned that the requirements of the Constitution in all other respects were complied with in the enactment of the statute under consideration.

The notice given was as follows: "To whom it may concern." "You will take notice that at the next session of the legislature of the State of Alabama an application will be made for the passage of a law to create a new county out of portions of Henry, Dale and Geneva

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counties, which new county will be called "Liberty," and to define and fix the boundaries of said new county." This December 29, 1902," signed by G. H. Malone and others.

That part of section 106 of the Constitution pertinent to the question before us reads as follows: * * * * "which notice shall state the substance of the proposed law," etc.

Section 39 of Article 2 of the Constitution under the head of State and County Boundaries, is as follows: "Section 39. The legislature may by a vote of two-thirds of each house thereof arrange and designate boundaries for the several counties of this State, which boundaries shall not be altered, except by a like vote; but no new county shall be formed hereafter of less extent than six hundred square miles, and no existing county shall be reduced to less than six hundred square miles; and no new county shall be formed unless it shall contain a sufficient number of inhabitants to entitle it to one representative under the ratio of representation existing at the time of its formation, and leave the county or counties from which it is taken with the required number of inhabitants to entitle such county or counties, each, to separate representation; provided, that out of the counties of Henry, Dale and Geneva a new county of less than six hundred square miles may be formed under the provisions of this article, so as to leave said counties of Henry and Dale and Geneva with not less than five hundred square miles each."

The title of the act in question reads as follows: "To create out of the counties of Henry, Dale and Geneva a new county, to be called Houston, and to define the boundaries thereof."—Local Acts, 1903, p. 225. This act contains two sections. By the first section the new county is declared created out of the counties of Henry, Dale and Geneva, and is given the name of Houston. In the second section, the boundaries of the new county are defined.

The insistence is, that the notice of the proposed law should have stated the boundaries of the new county as defined and fixed in the act, and failing in this, the notice

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failed to state the substance of the proposed law, as required by § 106 of the Constitution.

In the case of *Wallace v. Board of Revenue*, 37 So. Rep. 321, having under consideration that provision in § 106 of the Constitution with which we are dealing, this court in an opinion by Justice HARALSON, among other things said: * * * "Any notice, therefore, which falls short of advising the public of the substance of such legislation, would be deceptive or misleading, depriving those opposed to it, of a fair opportunity to protest against and oppose its enactment."

"The word 'substance' as employed in the section cannot be said to be synonymous with 'subject', or mere purpose. It means "the essential or material part, essence, abstract, compendium, meaning Worcester's Dictionary." The opinion then referring to the debates had on the subject in the constitutional convention, quotes the reply of the chairman of the committee, to an enquiry by one of the members on the floor, as to the meaning of the terms "substance of the proposed law" as employed in the section, which reply by the chairman was: "The committee did not desire that the community should be misled as to the purpose of the law, and sometimes the caption of the law is very misleading, and it was to obviate advantage being taken of the public in the matter that it was written as it is." "The section was then adopted." Following this Justice HARALSON, in his opinion, says: "From this it would seem that it was intended that the essential or material part, the essence, the meaning, or an abstract or compendium of the law, was to be given, and not its mere purpose or subject." It was further said in that case, "The title of a bill may give notice of its substance, but most often it does not." That is to say, that the substance of a bill may be contained in its title, which we think is true in this case we have before us.

The Constitution expressly authorizes the creation of a new county out of the counties of Henry, Dale and Geneva, and in so doing fixes a minimum limitation of territorial area of the remaining counties from which the new county is created at five hundred square miles,

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which is different from the provision as to all other counties, in that the minimum territorial area in such other counties is fixed at six hundred square miles. Section 39 also provides that the legislature "may by a vote of two-thirds of each house thereof, arrange and designate boundaries for the several counties of this State," etc, and this is applicable to any new county that may be created.

Does the notice which was given state the "essence, the meaning or an abstract or compendium of the proposed law?" If so, then there was a compliance with the requirement of the provision in the Constitution. The substance of the proposed law was the creation of a new county, and the territory from which it was to be taken. The notice fully informed the public, and especially those in the locality to be affected,—the citizens of the counties of Henry, Dale and Geneva, of what was to be done. It informed them that a new county was to be created from a certain territory, viz: from the counties of Henry, Dale and Geneva. And everybody knew that the Constitution required the legislature to fix and define the boundaries. In so far as the purpose of the law, as to giving an opportunity to those in the locality to be affected is concerned, in order that such as might chose to do so, should have an opportunity to contest and oppose the enactment of the proposed law, the notice given amply met the requirement of the Constitution in this respect. There was nothing in any conceivable way that could be considered as misleading or deceptive in the notice.

In the case of the *State ex rel Covington v. Thompson*, decided at the present term, this court, speaking through Justice SIMPSON, said: "Constitutions are made for practical purposes, and not merely for the exercise of critical gymnastics, and in the construction of them we are to take into consideration the conditions which confronted the constitution-makers, and we are, if possible, to give the instrument such construction as will carry out the intention of the framers, and make it reasonable rather than absurd."

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The creation of new counties when conditions should so authorize, is clearly contemplated in the Constitution, and as to the new county in question is expressly provided for in § 39, and this is one of the "practical purposes" for which it was made. In applying the provision contained in § 106, requiring the notice to state the "substance of the proposed law," to the case we have in hand, a construction of the above provision that would, in all reason, practically operate to prevent the creation of the new county, would be absurd rather than fair and reasonable. If in stating the "substance of the proposed law" in a notice given by private persons, for the creation of a new county, it be required that the boundaries of such proposed new county shall be "fixed and defined" in such notice, for reasons that naturally and readily suggest themselves to the common mind, it would become next to, if not impossible, to ever create a new county in this State, every change made by the legislature in fixing and defining the boundaries from that given in the notice, would be fatal to the enactment of the statute.

The notice here given for the creation of a new county out of the counties of Henry, Dale and Geneva, states the essence, abstract or compendium of the proposed law, and in this, we think, within the meaning of § 106 of the Constitution, stated the "substance" of the law. It was never intended that the required notice should state the proposed law in its entirety. The boundaries to be "fixed and defined" by the legislature were matters embraced in and covered by the "essence," "abstract," or "compendium," *substance* stated in the notice. Taking into consideration the object and purpose of the provision contained in § 106, as to the statement of the notice of the "substance" of the proposed law, and the character of the act under consideration, and the express provision made in the Constitution in reference to the creation of this county out of the particular counties, our conclusion is, that the notice sufficiently complied with the constitutional requirements in stating the substance of the law.

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It follows from what we have above said, that the judgment appealed from must be affirmed.

Affirmed.

MCCLELLAN, C.J., TYSON, SIMPSON, ANDERSON and DENSON, J.J., concurring.

Ex parte Bettis.

Application for Habeas Corpus.

1. *Habeas Corpus; when convict not discharged by reason of detention.*—While a party who has been convicted and sentenced to hard labor for the county must not thereafter be detained by the sheriff for an unreasonable length of time; yet if the conviction was had on Sept. 19, the detention of the defendant so convicted until Oct. 4, is not a detention for such unreasonable length of time, as would authorize his discharge on writ of habeas corpus.

The facts in this case are sufficiently stated in the opinion.

JOHN S. GRAHAM, for petitioner.—The law is clear and unmistakable; that any unreasonable detention entitles the prisoner to his discharge.—*Ex parte Goucher*, 103 Ala. 305; *Ex parte King*, 82 Ala. 59; *Ex parte Stewart*, 98 Ala. 66; *Ex parte Crews*, 78 Ala. 457.

MASSEY WILSON, Attorney-General,, for the State, cited *White v. State*, 134 Ala. 197, 208; *O'Neil v. State*, 134 Ala. 189, 194.

DENSON, J.—On the 19th day of September, 1904, the petitioner was convicted in the county court of Clarke county of three distinct misdemeanors, and upon each conviction the court awarded as punishment three months hard labor for the county.

On the 4th day of October, 1904, the petitioner being confined in the county jail under the judgments of conviction, applied to the probate judge of Clarke county

[*Ex parte Bettis.*]

for a writ of habeas corpus to procure his discharge. The writ was issued, addressed to the sheriff, and on the same day the sheriff made his return, and the probate judge heard the case and declined to discharge the prisoner.

The petitioner upon the record of the proceedings had, before the probate judge, has renewed his application to this court for the writ of *habeas corpus*.

The supposed right of the petitioner to be discharged from custody is rested upon the theory that he has been detained by the sheriff for an unreasonable length of time in the county jail, and that the detention is a "subsequent act, omission, or event," within the meaning of subdivision 2 of section 4838 of the Code of 1896, such as warrants his discharge on writ of *habeas corpus*.

It is settled by this court, beyond disputation, that where a party has been convicted and sentenced to hard labor for the county, a sheriff must not detain him afterwards, in the county jail or elsewhere, for an unreasonable length of time, and that an unreasonable detention, entitles the prisoner to be discharged from the custody of the sheriff. It is equally as well settled, that what will constitute unreasonable time in this connection, depends upon the circumstances of each particular case.

It would serve no good purpose to thresh over the decisions that bear upon this case, suffice it to say, we have carefully examined the proceedings in every particular, as shown by the transcript, and we are of the opinion that the petitioner does not present a case which entitles him to the relief prayed for.—*O'Neal's case*, 134 Ala. 189, and authorities there cited.

It must not be understood from this decision, that the court is committed to the mode of procedure which was adopted to bring this case before this court. The mode of procedure has not been assailed. We call attention to the general proposition that, where right of appeal is given, it is usually the remedy that must be resorted to. Code 1896, § 4314.

The prayer of the petition is denied.

MCCLELLAN, C.J., HARALSON and DOWDELL, J.J., concurring.

[Johnson *et al.* v. The State.]

Johnson *et al.* v. The State.

1. *Habeas Corpus; homicide; when bail properly denied.*—Where in a habeas corpus proceedings seeking bail under an indictment for murder, it is shown that the homicide was committed by the father of the petitioners in shooting a deputy sheriff while resisting arrest by that officer and others, and no justification for the killing is shown, and it is reasonably certain that had not the petitioners interfered, the killing would not have occurred, the fact that the petitioners' father was at the time of committing the homicide insane, does not relieve them from the responsibility for the killing, and it is not error for the court to refuse to permit the petitioners to prove the fact of their father's insanity.

Habeas Corpus Proceedings.

APPEAL from the Order of the Judge of the Second Judicial Circuit.

Heard before the Hon. J. C. RICHARDSON.

The appeal in this case is prosecuted from from an order of the judge of the 2d judicial circuit in denying to the appellants, Maggie Johnson and Katie Johnson, bail in *habeas corpus* proceedings.

The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

PEARSON & RICHARDSON and RICHARDSON & SMYTHE, for appellant.—Cited *Karr v. State*, 106 Ala. 10; *Whitley v. State*, 91 Ala. 108; *Gibson v. State*, 106 Ala. 64; *State v. Cain*, 20 W. Va. 681; *Greear v. State*, 22 W. Va. 800; *Summers v. State*, 105 Ind. 125.

MASSEY WILSON, Attorney-General, for the State.

TYSON, J.—This is an application for bail, after indictment found charging the petitioners with murder in the first degree. On a hearing, the judge dismissed the

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petition and remanded the prisoners to jail. The correctness of the ruling of the judge upon the trial is assailed only in one particular.

The evidence establishes that the father of these petitioners shot and killed a deputy sheriff in resisting his arrest by that officer and others. No justification is shown for the killing. And it is reasonably certain that had these petitioners not interefered, the killing would not have occurred. Indeed, their father would have been overpowered by the officers without bodily harm to him and thus been rendered impotent to have procured and used the pistol with which he inflicted the deadly wounds, had they not by their conduct freed one of his hands from the grasp of the officer who was killed. That these petitioners' conduct, under the evidence, was the cause of the killing scarcely admits of doubt. But it is said that the father was insane at the time of the killing and that his insanity was known to the petitioners, and that they should have been permitted to prove these facts. The theory seems to be that if he was insane, and therefore incapable of committing murder, the father to commit the crime, they are responsible for this act of firing the pistol which produced the death of the officer. Had the trial judge permitted this proof to have been made and had found in line with it, in view of the conduct of the petitioners on the occasion of the homicide, which was calculated to incite and did incite the father to commit the crime, they are responsible for his act. As said by Mr. Bishop, "The method of the killing is immaterial. Thus * * * in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, as where one incites a madman to kill himself or another."—2 Bishop's New Crim. Law, § 635.

This principle is stated by Russell on Crimes, p. 5, in this language: "If A. procures B., an idiot, or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument." See also 1 East. P. C. Ch. V., § 14, p. 228; 1 Hawkins P. C., § 7, p. 92.

Affirmed.

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MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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Petition for Habeas Corpus.

1. *Extradition; habeas corpus; what can be shown on hearing.*—

Where in compliance with a writ of extradition from the Governor of another State, a prisoner alleged to be a fugitive from justice in this State, is arrested under a warrant issued by the Governor, and upon such arrest seeks to be discharged from custody under a writ of *habeas corpus*, although the return to the writ of *habeas corpus* makes out a *prima facie* case, and the prisoner cannot require the court before whom the *habeas corpus* is heard to inquire into the merits of the crime charged, it is permissible for him to show that he is not a fugitive from justice, or that the process is void; and if the indictment or affidavit, which is the basis of the extradition charges no crime under the laws of the demanding State, he should be permitted to establish that fact.

APPEAL from the Order of the Judge of the City Court of Montgomery.

Heard before the Hon. WILLIAM H. THOMAS.

On the 20th day of May, 1904, the governor of Louisiana issued a requisition upon the governor of the State of Alabama, commanding that E. Percy Barriere, the appellant in this case, be apprehended and turned over to a certain named person as the duly authorized agent of the State of Louisiana; it being recited in the requisition that the said Barriere was charged with the crime of deserting his wife and minor child, and was a fugitive from justice from the State of Louisiana, and had taken refuge in the State of Alabama. In compliance with this requisition the governor of Alabama issued a warrant for the arrest of the said Barriere and commanding that the officer so arresting him deliver him into the custody of the named authorized agent of the State of

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Louisiana. Upon the said Barriere being arrested under said warrant issued by the governor, he filed the petition in this case, addressed to the Hon. William H. Thomas, associate judge of the city court of Montgomery, asking for the issuance of a writ of *habeas corpus*, and that upon the hearing of said writ the petitioner be discharged from custody.

The first four paragraphs of the petition for *habeas corpus* were as follows: "To the Honorable William H. Thomas, Associate Judge of the City Court of Montgomery: Your petitioner, E. Percy Barriere, would respectfully represent unto your honor that he is imprisoned by Thomas J. Roche as a special agent of the State of Louisiana, and that the cause of his detention is on account of a warrant issued by R. M. Cunningham, Governor of Alabama, Lieutenant-Governor acting, upon a requisition issued from the governor of Louisiana for desertion of family, and is held by virtue of a governor's warrant, a copy of which is in the possession of defendant, a copy of which is hereto attached and made a part hereof, and marked Exhibit "A." 1st. Your petitioner is illegally restrained of his liberty, because the jurisdiction of your court issuing the warrant against him is not authorized by law and has been exceeded as to matter, or place, or person. 2d. The process of which your petitioner is held is void in consequence of the defects in the matters therein contained, and in the substance thereof, as required by law. 3d. The process was issued in a case and under circumstances not allowed by law. 4th. The process is not authorized by any judgment, order, decree, or any provision of the law." It was further averred in said petition that the petitioner was not a resident citizen of the State of Louisiana, but resided in the State of Mississippi; that the criminal proceedings instituted against him in the State of Louisiana were fictitious; that he had not deserted his wife and child, but that his wife had abandoned him, and had sought a divorce, and that the purpose of the criminal proceeding, which was the basis of the extradition, was for the purpose of securing service upon him in a divorce suit filed against him by his said wife, and

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that he was not a fugitive from justice. The respondent demurred to the petition upon the following grounds: 1. That it is not a ground for discharge; that it seeks to inquire into the jurisdiction of the court issuing a warrant in Louisiana. 2. That it is frivolous. 3. That it seeks to have a foreign court jurisdiction inquired into by the associate judge of the city court of Montgomery. 4. That the petition on its face shows that the petitioner was held under and by virtue of a warrant issued by R. M. Cunningham, Lieutenant-Governor, acting as governor of Alabama. 5. There is no power to go behind the affidavit and warrant issued by the court in Louisiana. This demurrer was sustained. To this ruling the petitioner excepted.

On the hearing of the cause the judge of the city court denied the relief sought by the petitioner, and from the order denying the relief, petitioner prosecutes the present appeal. In the order of the judge upon the hearing of said cause he requires the petitioner to give bail and fixed the amount thereof.

PEARSON & RICHARDSON and E. H. McCaleb, for petitioner.—Cited *Ex parte Reggel*, 114 U. S. 651; *Roberts v. Reilly*, 116 U. S. 80, 95; *Ex parte State in re Mohr*, 73 Ala. 503; Spear on Extradition, pp. 349, 351, 352, 353; *Ex parte Slausson*, 73 Fed. Rep. 666.

MASSEY WILSON, Attorney-General, and HILL, HILL & WHITING, for the State.—If appellant is charged with a misdemeanor under the laws of the demanding State, he may be extradited.—*Kentucky v. Dennison*, 24 Hon. 66; *Brown's case*, 112 Mass. 409; *Taylor v. Tainter*, 16 Wal. 366; *Com. v. Green*, 17 Mass. 515.

The record shows that appellant has been in Louisiana since the offense is alleged to have been committed, (Record, pp. 35 and 36). That makes him a fugitive from the demanding State.—*In re Mohr*, 73 Ala. 503, 513. Clearly the burden is on appellant to show he was not in Louisiana when the crime was committed or since. No evidence is found in the record showing his absence from the State at that time.—*In re Mohr*, 75 Ala. 511.

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The Supreme Court of the United States held that it was no objection to the right of the authorities of Alabama to remove from Texas a person there charged with crime in Alabama, because the indictment did not charge that the offense was committed in Alabama, or for other defects in the indictment, that these questions should be left to the courts of the demanding State.—*Pierce v. Texas*, 155 U. S. 311.

The affidavits are not required to charge the offense with the same particularity that indictments are. *Pierce v. Sheriff*, 43 La. Ann. 859; *State v. Arledge*, 48 La. Ann. 776; *Brazleton v. State*, 66 Ala. 96.

All cases not capital may be prosecuted in Louisiana by information.—Revised Laws of La. (Wolff), § 977, p. 258.

ANDERSON, J.—“The writ of *habeas corpus* is extolled by Blackstone as another Magna Charta of civil liberty. It is the most celebrated writ of English-speaking peoples. It is the process provided by law from deliverance from illegal confinement. The writ has no respect for persons. It lends itself to the humblest human being, and questions and enquires into the actions of the most exalted persons in the community and most powerful officers of government.

“In regard to extradition, this writ is indicated by the law itself as the special remedy available to the citizen against the misuse and abuse of that proceeding. Requisitions for persons stigmatized as fugitives from justice, when issued, as in the case at bar, on mere *ex parte* affidavit, and not founded upon indictment, are liable to abuse. Little care can be taken to obtain the real facts of the case by the officers issuing a requisition. Papers are prepared and the demand issued, often in the most perfunctory manner; and it is impracticable for the governor, to whom the requisition is addressed, to enquire into the merits of the proceeding. The questions based upon affidavit are issued only in sudden emergencies, rarely after as much as four months of deliberation. The law provides for no hearing to the alleged fugitive before the executives of the two States, and seem to rec-

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ognize the fact that he has no redress except in this writ of high privilege,—this writ of *habeas corpus*.”—*Ex parte Slauson*, 73 Fed. Rep. 667.

The judge of the city court had the authority to issue the writ of *habeas corpus*, and to review the proceedings under which the petitioner was held. “The act of the governor can be reviewed, and, if he has not followed the directions and observed the conditions of the Constitution and laws of the United States, pertinent to such matters, can be set aside as void. The highest as well as the most obscure official must respect the requirements of the constitution and the laws made thereunder. The acts of the executive are subject to review by the courts by means of the writ of *habeas corpus*. It is not now necessary to cite authorities on this question, nor to recall incidents in English history, showing that this writ will issue, no matter how obscure the prisoner, nor how great the power of the official who detains him.” *Ex parte Hart*, 11 C. C. A. 176-7.

The relief sought has been denied by the judge of the city court, and the petitioner has a clear right to appeal to this court.—§ 4314 of the Code of 1896. Not only does said section give the petitioner the right of appeal, but gives the State the same right in similar cases whenever the petitioner is discharged on the original hearing.

“Interstate extradition is regulated by law. No such power can ever be exercised by the chief executive of a State on the ground of comity.—Rorer, *Interstate Law*, 225. Nor has it ever been, in this country, properly and legally exercised on such ground. Comity may and does afford a strong reason for the enactment of laws providing for the extradition of criminals, that they may be brought to justice, and society be thus protected. But we must look to the law for the right to exercise this extraordinary power. Even before our present form of government came into existence we find a number of the colonial plantations entering into a *compact* in the nature of a treaty for the extradition of fugitive criminals. If it could be done upon comity alone why enter into a compact. As early as 1643 the plantations under the

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government of Massachusetts, the plantations under the government of New Plymouth, the plantations under the government of Connecticut and the government of New Haven, and the plantations in combination therewith, pledged themselves to each other to render to the colony from which he escaped, the fugitive from justice, and they described the means to be employed in such rendition.—*Kentucky v. Dennison*, 24 How. 66; Winthrop's Hist. Mass. 121, 126. A similar compact was entered into by the American colonies when they organized themselves under the articles of confederation and assumed the title of 'The United States of America.' The fourth of these articles provided that if 'any person, guilty or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and be delivered to the State having jurisdiction of his offense.' This article of the confederation was one of the principles of the 'firm league of friendship and perpetual union' that the then acting as sovereign and independent States established. The reasons of the creation of this power were public policy and public peace and public justice. But the reasons for the creation of a power are not the power, but they can only be used as a means of ascertaining what the created power is. The power under the articles of confederation is to be found in the fourth of these articles. The same power was incorporated into the constitution of the United States. The second section of the fourth article is as follows:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

"On the 12th of February, 1793, congress passed an act respecting fugitives from justice, and persons escaping from the service of their masters. The first section of this act is substantially reproduced in section 5278 of

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the Revised Statutes of the United States, and is as follows:

“Wherever the executive authority of any *State or Territory* demands any person, as a fugitive from justice, of the executive authority of any State or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, *certified as authentic* by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear,” etc.

“We are able to see by this history of the method of extradition among the colonies and States that almost from the first organization of civil society in this country it has been regulated, as to the right of and the method of the exercise of the right, by law. Those who founded the colonies came from countries where personal liberty was not at that time very secure, and they were, therefore, extremely jealous of the discretionary power founded upon comity or anything else affecting the liberty of the citizen. Hence they sought early in our history to provide by positive enactment, in the shape of compact or laws, in what case and in what manner the citizen shall be restrained of his liberty.” *Ex parte Morgan*, 20 Federal Reporter, 301-2.

In the case at bar the governor of Louisiana attaches a copy of the affidavit, thereby attempting a compliance with the Federal statute. He also refers to “Act No. 34, 1902” of the State of Louisiana, as setting forth and defining the crime with which the petitioner is charged.

It may be considered as settled law, that a *prima facie* case, that the prisoner is legally held, is made out, when the return to the writ of *habeas corpus* shows: (1) “A

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demand or requisition for the prisoner made by the executive of another state, from which he is alleged to have fled; (2) a copy of the indictment found or affidavit made before a magistrate, charging the alleged fugitive with the commission of the crime, *certified* as authentic by the executive of the state making the demand; (3) the warrant of the governor authorizing the arrest." When these facts are made to appear by papers regular on their face, there is a weight of authority holding that the prisoner is *prima facie* under legal restraint.—*Ex parte State v. Mohr*, 73 Ala. 503; Spears Law of Extrad. 208, 303; *Matter of Clark*, 9 Wend. 212; *State v. Schlem*, 4 Harring, 577; *People v. Brady*, 56 N. Y. 182.

Although the return makes out a *prima facie* case and the prisoner cannot require the courts of the state in which he is arrested to inquire into the merits of the crime charged, he is permitted under the law to show that he is not a fugitive and can show that the process is void. And if the indictment or affidavit charges no crime under the laws of the demanding state, he should be permitted to establish that fact.—*Ex parte State v. Mohr*, *supra*.

"By the act of congress the affidavit upon which the requisition is based must be set out. This wise provision is to prevent the restraint of liberty by false charge and fraudulent papers; to enable the executive, upon whom the demand is made, to determine whether there is probable cause for believing a crime has been committed."

"The affidavit, when this form of evidence is adopted, must be so explicit and certain, that if it were laid before a magistrate, it would justify him in committing the accused to answer the charge." Hurd on Habeas Corpus, 611.

In the case at bar we can only presume that the affidavit charges the petitioner with the commission of a crime, as the act under which it is made is not before us. The bill of exceptions recites that the act was offered in connection with the objections of the petitioner to the introduction of the return, etc., but as it is not set out in the bill of exceptions, we are unable to consider it. This court cannot take judicial knowledge of the statutes of another state.

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As the petitioner had the right to show that he was illegally restrained of his liberty, and to show that the process under which he was detained was illegal and void; the judge of the city court prevented his doing so by sustaining the demurrers to paragraphs 1, 2, 3 and 4 of the petition and erred in so doing.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J. J., concurring.

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Proceedings in Quo Warranto.

1. *Term of office of Judge of Probate not effected by the General Election Law of 1903.*—The “Act to further regulate elections in the State of Alabama,” approved October 9, 1903, (Acts 1903, p. 438), did not extend the terms of office of the Probate Judges then in office for an additional year; and under the provisions of said Act a Judge of Probate whose term of office commenced November 3, 1898, could not hold said office longer than a reasonable time after the expiration of his term of November 3, 1904, and until his successor was elected on November 8, 1904, could qualify.

APPEAL from the Circuit Court of Marengo County.
Heard before the HON. JNO. T. LACKLAND.

The proceedings in this case were had upon an information in the nature of a *quo warranto* being filed by the State of Alabama on relation of Alonzo L. Hasty, and Alonzo L. Hasty, as an individual. The petition was addressed to the Judge of the 1st Judicial Circuit, and filed in the Circuit Court of Marengo County. It was averred in the petition that Alonzo L. Hasty was a resident of Marengo County, and that on the eighth day of November, 1904, he was duly elected Judge of Probate of Marengo County, Alabama, and was regularly declared to have been elected; that there was issued to him a com-

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mission as Probate Judge of Marengo County, which commission he held at the time of the filing of the information; that he had given bond, and had taken the oath of office prior to the filing of the information; that the appellant, Samuel P. Prowell, at the time of the filing of the information held and exercised the office of Probate Judge. The prayer of the petition was that a writ of *quo warranto* or other proper writ be issued, directing the said Samuel P. Prowell to show by what warrant or authority he holds and exercises the office of Probate Judge of Marengo County; that upon the hearing the respondent be excluded from said office, and that judgment be rendered declaring that the said Hasty was entitled to the office of Judge of Probate of said County.

The respondent demurred to the petition upon the following grounds: 1. Under the law the said Samuel P. Prowell was entitled to hold the office of Judge of Probate of Marengo County until the 3rd day of November, 1905, and that said Hasty was not entitled to assume said office until said date. 2. The allegations of the petition show on its face that the said Hasty was elected to the office of Judge of Probate of said County subsequent to the 3rd day of November, 1904, and could not qualify as such Judge of Probate until the 3rd day of November, 1905. These demurrers were overruled. Thereupon the respondent filed an answer, which was in words and figures as follows: "That on to-wit: the 1st Monday in August, 1898, the said respondent was duly and legally elected to the office of Judge of Probate of Marengo County, Alabama, and that thereafter he took the oath of office and executed, had approved and filed the bond required by law, and received a commission from the Governor and was on to-wit: the 3rd day of November, 1898, duly installed into the office of Judge of Probate of Marengo County, Alabama, for a term of six years, and until his successor was elected and qualified. That his successor has been elected, and was so elected on the 8th day of November, 1904. That his said successor, the said A. L. Hasty, cannot under the law, assume said office until the 3rd day of November, next after his election, which is the 3rd day of November, 1905,

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and that until the said 3rd day of November, 1905, he is entitled to hold said office." To this answer the petitioner demurred upon the following grounds: 1. Said answer shows that the respondent's term of office expired November 3rd, 1904. 2. Said answer shows that the respondent is holding said office unlawfully. 3. The said answer shows that Alonzo L. Hasty was entitled to said office upon his having been duly elected and qualified for the position. 4. The said answer shows no right or warrant in respondent to hold said office. This demurrer was sustained and the respondent declining to plead further the Court rendered a judgment holding that the said Alonzo L. Hasty was entitled to the office of the Judge of Probate of Marengo County, Alabama; that the respondent was unlawfully holding and exercising the duties of said office, and was intruding therein, and ordered and adjudged that the said respondent be ousted and excluded from said office. The respondent appeals and assigns as error the ruling of the trial court upon the pleadings, and the judgment of ouster.

J. M. MILLER and DE GRAFFENREID & EVANS, for appellant.

No counsel marked as appearing for appellee.

SIMPSON, J.—This was a proceeding in the nature of "*quo warranto*" under § 3420 of the Code of Alabama, brought by appellee, against appellant.

The demurrers, and argument of counsel, in connection with the petition and answer, show that Samuel P. Prowell was elected judge of the probate court of Marengo county at the general election in August, 1898, and that said A. L. Hasty was elected to the same office at the general election on the 8th day of November, 1904; and the question at issue is, that said Prowell claims that he is entitled to hold said office until November, 1905, while the relator, A. S. Hasty claims that, having been duly elected, and having been qualified and commissioned, by the Governor of Alabama, he is entitled to demand that said office be turned over to him.

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The Constitution of 1875, which was in force when said Prowell went into office, provided that the probate judges should "hold office for the term of six years, and until their successors are elected, or appointed, and qualified." His term of six years expired on the 3rd day of November, 1904, and his successor has been elected, has qualified and been commissioned. But appellant claims that, inasmuch as sections 3054, and 3354, of the Code of Alabama, stand unrepealed, providing that probate judges, and other officers hold their terms for six years, from the 3rd day of November after their election, and until their successors are elected and qualified, said Hasty's term is necessarily until November, 1905, and said Prowell is entitled to hold the office, until that time.

We regard it as the settled law of this State that the words "until his successor is elected and qualified" was never intended to prolong the term of office beyond a reasonable time, after the election, to enable the newly elected officer to qualify.—*Hughes v. City Council of Montgomery*, 65 Ala. 201, 206-7; *Chelmsford v. Demarest*, 73 Mass. (7 Gray) 1.

As stated by Chief Justice BRICKELL, in the *Hughes* case, *supra*, after the expiration of such reasonable time, the office would become vacant. Consequently, if the law should be declared, as contended for by appellant, it would work no benefit to him. But, without stopping to consider what would be the result as to the relator in this proceeding, and, as the parties to this cause desire, and the interest of the public demand that the rights of the parties be fully decided, without regard to technicalities, we proceed to inquire, did the Legislature of Alabama, by the enactment of the "Act to further regulate elections in the State of Alabama," (Acts 1903, p. 438), intend to extend the terms of the probate judges, then in office, for a year, and to provide that the officers elected on Nov. 8th, 1904, should not enter upon the duties of office for a year after their election?

It would seem from the mere statement of the proposition, that if such a decided, not to say unusual change had been intended, the Legislature would certainly have

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expressed itself in apt terms, so that there could be no doubt as to its intentions.

The title of the act shows that it did not intend to change the term of office of any officer. With § 45 of Art. IV. of the Constitution before the Legislature, that body entitled this act, simply one "to further regulate elections." If such a general title could have been adopted as to provide this change without being obnoxious to the single subject provision the title adopted certainly did not advertise to the world that a law was about to be enacted which would have the effect of extending the terms of probate judges, who had been elected by the people for a definite term, for a year longer, and requiring the officers, who should be elected to succeed them, to wait a year in order that this gratuity might be enjoyed by the retiring officers; and that too, in spite of § 155 of the Constitution (both the old and new one being identical) that probate judges should hold for "six years and until their successors are elected and qualified" and providing that their right to hold for that term "shall not be affected by any change hereafter made in the mode or time of elections."

It is true that this provision relates specially to shortening the term of office, but the entire section shows a clear intencion, in the minds of the Constitution makers to fix the term of office, and, without a very clear expression to that effect, we will not presume that the Legislature intended to extend the term fixed by the Constitution for another year, when no reason has been suggested or can be imagined why such a thing should be done.

Section 158 of the Constitution further shows that a term should not be extended beyond the limit fixed by the Constitution, for it provides that, in case of a vacancy occurring, an appointment shall be made, and that the appointee shall "hold his office until the next general election." Under the construction of the law contended for by appellant if he had died a year before the election the person, appointed in his stead, could have held only until the next general election, and then there would have been a vacancy, of a year, with the man already elected by the people, prohibited by the very law of his

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election, from assuming the duties of the office to which he had been elected.

"The law abhors vacancies in public offices, and great precautions are taken to avoid their occurrence."—Throop on Public Officers, § 308.

It has been decided by the New York court of appeals that, even where the constitution had left it to the legislature to fix the terms of judicial officers, and the legislature had fixed the term, it could not, constitutionally, extend the term of any officer, by act of the legislature. Judge FOLGER in delivering the opinion of that court, very pertinently says: "If the Legislature can, by extending the term of such an office, continue in it the holder thereof for one year, it may for any number of years; and thus the duration of the term thereof may be perpetuated by legislative power; and the people, after one exercise of the constitutional power of choosing certain of their officers, be, ever after, deprived of it."—*The People ex rel Fowler v. Bull* (46 N. Y.) 7. Am. Rep. 302, 306. And in our own court, Chief Justice BRICKELL, in the case of *Plowman v. Thornton*, 52 Ala. 567, sustains the action of the Convention, in extending the term of Judge SAFFOLD, beyond six years, because there was no government then, recognized by Congress, so that it devolved on the Convention to organize one, and he plainly intimates such an extension could not be made, by simply legislative action.

Unless some other time is fixed for the beginning of a term of office, the general presumption is that the official term dates from the legal ascertainment of the result of the election, and the officer assumes the duties of the office as soon thereafter as he can qualify and receive his commission.—*Atty. Gen. ex rel Haight v. Love*, 39 N. J. Law Rep. 476; Throop on Public Officers, § 314; Lawson's Rights & Remedies, § 3807.

While we think the language of this statute, shows plainly an intention simply to postpone the time of election and necessarily to postpone the induction into office for a few days, which would be covered by the reasonable time allowed under the expression "until his successor shall be elected and qualified," yet, if the law needed any

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further interpretation, it is legitimate to take into consideration the history which led up to its enactment, the surrounding circumstances and the ends intended to be accomplished by the act.

When the Constitution of 1868, changed the time of general elections from August until November, in order to prevent a vacancy, the interval was bridged over by an ordinance of the Convention providing for an election in February and also providing that the officers then elected should hold office for the prescribed term of years, beginning from the day of the next general election, after the admission of the state into the Union.

There followed the Act 1868, p. 271, § 7, fixing the first Tuesday in November, 1868, (being November 3rd) as the date of the general election.

Then when the Constitution of 1875, returned to August as the time for general elections, it was specially provided, in the schedule (§ 3) that "all judicial officers elected * * * on the 3rd day of November, 1874 * * * shall continue in office * * * until their respective terms expire, as provided by the present Constitution and laws of the State."

The act of 1876-7 p. 103, § 8, while providing for the general election in August, also provided that the officers elected should "not enter on the discharge of their duties of their respective offices until after the first Tuesday after the fourth Monday in November."

Then the Constitution of 1901, having returned to November as the time for general elections, provided, in its schedule (§ 3) that "all * * * judicial officers * * * elected in August * * * continue in office, and exercise the duties thereof until their respective terms shall expire as provided by the Constitution of 1875, or the laws of this State."

Then the act of 1903 was enacted for the purpose of conforming our election laws to this last Constitution.

The Constitution and laws, in existence at the time of appellant's election in 1898, fixed the termination of his term and the commencement of that of his successor, at November, 1904. The Constitution of 1901, fixed the same term, and specifically provides for the same to terminate at the same time, which time in the previous

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Constitution and laws had been fixed as the first Tuesday after the first Monday in November.

We hold that the legislative intent to preserve the terms of office, notwithstanding the changes in the time of holding the elections, is so clear, that the mere fact that two sections of the Code, which belong to the old system, when elections were held in August, have been left, without being specially repealed, cannot operate to defeat the plain purpose of the Constitution and laws as they now stand.

The act of 1903, p. 438, is a general revision of the election laws of the state. "It is an old and well defined rule of statutory construction that a subsequent statute, revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate a repeal of the former."—*Lemay v. Walker*, 62 Ala. 39, 40.

The judgment of the court is affirmed.

McCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

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Petition for Mandamus.

1. *Constitutional law; de facto judge.*—A person who is commissioned by the governor as judge of the Circuit Court in a certain designated circuit, and under such commission attempts to exercise the duties of the office of such circuit judge at a time when, and place where the circuit court for a particular county could be legally held, is a *de facto* judge of the Circuit Court of the State, although the Act of the Legislature which creates the judicial circuit to which he was appointed, was unconstitutional, and his appointment by the governor was void.
2. *Same; same.*—The acts of a *de facto* circuit judge at a time and place when and where the Circuit Court for a particular county can be legally held, are valid in so far as they concern the judge or third persons who have an interest in the things done until his title to the office is adjudged insufficient; and

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an indictment preferred by a grand jury organized by such judge at such time and place, is not void, and should not be stricken from the files of the court, although it is subsequently judicially ascertained that the act creating the said judicial circuit was unconstitutional and said judge's appointment was void.

The State of Alabama on relation of the attorney general and his solicitor of the 8th Judicial Circuit Court, filed an original petition in the Supreme Court, praying for a writ of mandamus to be issued out of said court to the Judge of the 8th Judicial Circuit Court, requiring him to restore to the docket of the Circuit Court of Madison County for trial, the case of the State v. Stovall and to vacate an order made by him, striking the indictment of said case from the files of the court.

The facts in the case are sufficiently stated in the opinion.

MASSEY WILSON, Attorney-General, and D. C. ALMON, for petitioner.

TYSON, J.—This is a petition for a writ of mandamus to the judge of the 8th judicial circuit to require him to restore to the docket of the circuit court of Madison court for trial the case of the State v. Stovall, and to vacate an order made by him striking the indictment from the files of the court.

The action of the judge was predicated upon the theory that the indictment was void because preferred and presented by a grand jury not legally constituted.

It appears from the record that it was preferred by a grand jury organized by Hon. Paul Speake as judge of the sixteenth judicial circuit on the 19th day of February, 1904.

The sixteenth judicial circuit and the office of the judge thereof was created by the Act of the General Assembly, approved October 12, 1903 (General Acts. 1903, p. 566) known as the Lusk bill, which Act was in the case of *Board of Revenue of Jefferson Co. v. Crow*, 37 So. Rep. 469, declared by this court to be unconstitutional.

Confessedly there never existed a sixteenth judicial circuit or the office of the judge thereof; so, then, the

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question presented is, whether the Hon. Paul Speake was a *de facto* judge of the circuit court of the State. He was commissioned by the Governor and attempted to exercise the duties of the office of circuit judge, it is true, under an unconstitutional Act and a void appointment, but independent of the Lusk Act there existed the office of circuit judge of the 8th judicial circuit and a circuit court in and for the county of Madison. He was not, it is true, legally judge of that circuit or judge of any other circuit. Had he been he would have been a *de jure* judge and, of course, the question here presented could never have arisen. We have here then a legally existing office of circuit judge and the duties of that office exercised by a person under the provisions of a statute that is unconstitutional, at a time and place when the court could be legally held.

Where this is the case, the authorities seem to be practically unanimous in holding that such a person is a *de facto* officer and that his acts are valid in so far as they concern the public or third persons who have an interest in the things done until his title to the office is adjudged insufficient.—8 Am. & Eng. Enc. Law (2d ed.) pp. 793, 815, 816 and note 1; also p. 818. See also *Walker v. State*, in MSS., and cases there cited. In other words, the acts of a *de facto* officer are as effectual when they concern the rights of third persons or the public, as if they were the acts of a *de jure* officer. See note on page 148, 42 Am. Dec.

As said by the Supreme Court of the United States in *Norton v. Shelby County*, (118 U. S. Rep. 441); "The doctrine which gives validity to acts of officers *de facto* whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode

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prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.

In *Plymouth v. Painter*, 44 Am. Dec. 579, this doctrine is thus stated: "The principle established by these cases, in regard to the proceedings of officers *de facto*, acting under color of title, is one founded in policy and convenience; is most salutary in its operation; and is, indeed, necessary for the protection of the rights of individuals, and the security of the public peace. The rights of no person claiming a title or interest under or through the proceedings of officers having an apparent authority to act, would be safe, if he were obliged to examine the legality of the title of such office up to its original source, and the title or interest of such person were held to be invalid, by some accidental defect or flaw in the appointment, election or qualification of such officer, or in the rights of those from whom his appointment or election emanated; nor could the supremacy of the laws be maintained, or their execution enforced, if the acts of officers having a colorable, but not a legal title, were to be deemed invalid."

It follows that the indictment is valid and that the order of the judge with respect to it was erroneous.

The writ of *mandamus* will be awarded as prayed for.

MCCLELLAN, C. J., HARALSON, DOWDELL, SIMPSON, ANDERSON and DENSON, J.J., concurring.

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Proceedings in the Nature of Quo Warranto.

1. *Board of Revenue of Montgomery County; local act requiring appointment not repealed by general election.*—The local Act approved Feb. 28, 1903, providing that the members of the Board of Revenue of Montgomery County should be appointed
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by the Governor, is not repealed by the general election law approved Oct. 9, 1903, which provides for the election of different State and County officers.

APPEAL from the City Court of Montgomery.

Heard before the HON. A. D. SAYRE.

The proceedings in this case were instituted by the State of Alabama on the relation of A. P. Tyson and others against the appellees. The purposes of the proceedings and the facts averred in the information are sufficiently set forth in the opinion.

To the information and the petition the respondents demurred upon the following grounds: "1st. (a) Said information and petition show that respondents are holding said office under appointment from the Governor of the State of Alabama, and that the term of said office has not expired. (b) Said General Act was not passed in compliance with constitutional requirements. 2nd. Said information and petition shows that respondents were appointed to and are holding said office under commissions from the Governor of Alabama, and that the term of said offices has not expired. 3rd. Said information and petition fails to show that the Acts of the General Assembly and the Legislature of Alabama, under which respondents were appointed to said office has been repealed. 4th. Said information and petition show that the office of member of Board of Revenue of Montgomery County is an appointive and not an elective one, and that respondents are holding said office under a valid appointment to the same. 5th. Said information and petition show that respondents have and are duly qualified to hold said office and have been duly commissioned to hold the same. 7th. Said information and petition show that respondents are entitled to hold said office of Board of Revenue of Montgomery County. 8th. The title of said general election act does not include the repeal of the acts under which the members of the Board of Revenue of said County are made appointive." This demurrer was sustained, and the relator declining to plead further judgment was rendered in favor of the respondent. From this judgment the present appeal is prosecuted and the appellant assigns as error the sustaining of the infor-

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mation and the petition, and the rendition of judgment in favor of the respondents.

J. M. CHILTON and O. C. MANER, for appellants.

Where a later act revises the whole subject covered by earlier laws, general or special, the last Act will be held to repeal such prior Acts insofar as repugnant.—*David v. Levy*, 119 Ala. 241; *Barker v. Bell*, 46 Ala. 221; *Edson's case*, 104 Ala. 50; *Simpson v. May*, 49 Ala. 376; Am. & Eng. Enc. of L. 2d ed. Vol. 26 pp. 730, 733, 743.

The fact that in the general law exceptions are made in respect to certain officers who were appointive and it is provided that such offices shall remain appointive, shows that when it was intended to make exceptions, the Legislature was careful to do so. The rule *expressio unius est exclusio alterius* is the maxim in such cases.—*Payne v. Bartlett*, 101 Ala. 193; 26 Am. & Eng. Ency. 1. (2d ed.) p. 694 and citations to note 6; *Coe v. City of Meridian*, 45 Conn. 155.

HORACE STRINGFELLOW and GEORGE M. MARKS, *contra*.

A repeal by implication is not favored by the law. Even as between two general statutes the rule is well settled that "In order to harmonize Legislative Acts, Courts are required to adopt, if necessary, rules of general and liberal construction. If it be possible to reconcile the two statutes so as to permit both to stand without violating sound principals of construction this will be done. The Court will not ordinarily declare a prior act to be repealed by a subsequent one in the absence of express words of repeal unless the provisions of the two are directly repugnant or as frequently expressed irreconcilably inconsistent."—*Roberts v. Pipin*, 75 Ala. 103; *Parsons v. Hubbard*, 64 Ala. 207; *Board of Revenue v. Barber*, 53 Ala. 593.

It is true that the words "in each County" cannot have their full force unless a Court of County Commissioners, Board of Revenue, or Court or Courts of like jurisdiction are elected in each county, but it is well settled that "where the intention of the Legislature is not apparent to that purpose (and it is not here) *the general words of*

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another and a later statute shall not repeal the particular provisions of a former one, the maxim of the law being *generalia specialibus non derogant*."—*City Council of Montgomery v. National Building & Loan Association*, 108 Ala. 343; *Parker v. Hubbard*, 64 Ala. 207; *Maricell v. State*, *supra*; *State v. May*, 49 Ala. 376; *Rice v. Westcott*, 108 Ala. 353; *White v. Burgin*, 113 Ala. 170; *Yahn v. Merritt*, 117 Ala. 485; *State v. Davis*, 130 Ala. 148; *Sanders v. Co. Commsnrs.*, 117 Ala. 543; *Pierce v. Co. Commsrs.*, *Ib.* 569.

DOWELL, J.—This is a proceeding on information in the nature of a *quo warranto* under the statute. The purpose of it is to oust the respondents from the office of commissioners of the Board of Revenue of the County of Montgomery.

The information sets forth the facts, upon which it is averred, that the respondents are guilty of usurpation of a public office, and on this is based the prayer of ouster, or exclusion from office. By the statement of facts it is shown that the respondents were appointed and commissioned by the Governor of the State of Alabama as commissioners of the Board of Revenue of Montgomery county on April 4th, 1903, under the local Act of the Legislature, approved February 28th, 1903; and that the terms for which they were appointed have not yet expired. It is also stated and averred in the information, that the relators were duly elected to the offices of commissioners of the Board of Revenue of Montgomery county, at the last general election held in November, 1904, under the general election law approved October, 9th, 1903. It is charged that the local statute, under which the respondents claim the right of office, was repealed by the general election law of October 9th.

The respondents demurred to the information, which demurrer was sustained by the city court, and upon the relators declining to plead further, judgment was rendered in favor of the respondents. From this judgment the present appeal is prosecuted.

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By an Act of the Legislature, approved March 11th, 1875, a Board of Revenue of Montgomery county, to consist of five members, was created, the members comprising the Board to be appointed by the Governor, and to hold office for a term of four years and until their successors were appointed and qualified. By an Act approved February 9th, 1877, the court of county commissioners of Montgomery county was abolished, and the jurisdiction and powers of the abolished court conferred upon the Board of Revenue. It was provided in section 2 of this Act, "That all general laws hereafter enacted by the General Assembly of Alabama, in relation to the jurisdiction, powers, authority or duties of county commissioners in this State, shall apply to said Board of Revenue of Montgomery county, except so much of said general laws as may relate to the mode of selecting the members of said courts of county commissioners."

By the Act approved February 28th, 1903, the county of Montgomery was divided into five revenue districts. The Act provides that the Board of Revenue of Montgomery county shall consist of five members, three from districts 1, 2 and 3 and one from each of districts 4 and 5, to be appointed by the Governor, their term of office to be four years commencing on the 4th of April, 1903, and until their successors are appointed and qualified.

At the same session of the Legislature and on October 9th, 1903, the general election law, being an Act, entitled "An act, To further regulate elections in the State of Alabama," was passed and approved. Section 24 of this Act provides: "The following officers of this State shall be elected by the qualified electors thereof." Among those named in this section are County Commissioners and Boards of Revenue. Section 25 of this Act provides that, "General elections throughout the State shall be held" for the offices named therein, enumerating the offices, and among them, "county solicitors in such counties where there are solicitors, whose offices are elective, county superintendents of education, Coroner and County Commissioners, or members of Board of Revenue, in each county, or courts or boards of like jurisdiction." By section 27 of the Act it is provided

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that one Coroner, County Commissioners or Board of Revenue of whatever number composed, or courts or boards of like jurisdiction, one tax assessor, one tax collector, one county treasurer, one county superintendent of education, two justices of the peace and one constable for each election precinct shall be elected on the first Tuesday after the first Monday in November, 1904, and every fourth year thereafter.

The repealing clause contained in section 107, is as follows: "All laws and parts of laws in conflict with this Act shall be and the same are hereby repealed."

We have here by the record, on the foregoing statement but one question presented for consideration, and that is, whether the members of the Board of Revenue of Montgomery county are now required to be appointed under the local Act of February 28th, 1903, or are required to be elected under the general Act to regulate elections in this State, approved October 9th, 1903. The determination of this question depends upon whether the former Act was repealed by the latter.

There is no express repeal of the Act of February 28th contained in the Act of October 9th. So if there is any repeal of the former by the latter, it must be one by implication.

In construing Legislative acts, it is the duty of the court always, if possible, to harmonize apparent inconsistencies and reconcile conflicts. In *Roberts v. Pippen*, 75 Ala. 107, it was said, "In order to harmonize legislative acts, the courts are required to adopt, if necessary, rules of fair and liberal construction. If it be possible to reconcile the two statutes so as to permit both to stand, without violating sound principles of construction, this will be done. The court will not ordinarily declare a prior act to be repealed by a subsequent one, in the absence of express words to repeal, unless the provisions of the two are directly repugnant, or, as frequently expressed, irreconcilably inconsistent."—*Pearce v. Bank of Mobile*, 33 Ala. 693; *George v. Skeaters*, 19 Ala. 738; Brick. Dig. p. 463, §§ 44, 45; Sedgwick's Stat. and Const. Law (2nd ed.), 98.

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The element of repugnancy between the provisions in a general statute and one that is special or local, ordinarily will furnish little or no aid in arriving at the intention of the legislature in the matter of repeal. Conflicts in terms and provisions in general and local statutes often exist, and yet both statutes stand, each having a field of operation. When both acts have the same scope, it may be difficult to give both a field of operation, but where, as here, although relating to the same subject matter, one is local in its operation and the other general, each having a distinct field of operation, what might seem a conflict between the two, disappears in finding spheres for the operation of both. In such a case the latter general act does not repeal the former local act unless a repeal is necessary to give the words of the general act any meaning at all.

In *Parker v. Hubbard*, 64 Ala. 207, it was said, there quoting from Sedgwick on Stat. & Con. Law; "When the mind of the Legislator has been turned to the details of the subject, and he had acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

In the case of *Marwell v. State*, 89 Ala. 150, was where a general statute in relation to the drawing of juries in capital cases was in conflict with a prior local act for Jefferson county on the same subject. The general act expressly repealed all laws and parts of laws general and special in conflict with it. It was reasoned in that case, that there was a manifest field of operation for both statutes, the local law in Jefferson county and the general law elsewhere in the State, and if the repeal relied on had depended upon the doctrine of repeal by implication, the question would involve no difficulty. The court held that the repeal was not by implication, but that there was an express repeal of all laws and parts of laws general and special in conflict with the general

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statute. It is to be observed here, that the general Act of October 9th, 1903, in the repealing clause contains no reference to special laws, as was the case in *Marwell v. State, supra*.

It is argued that as an exception is made in section 25 of the general law of October 9th with reference to county solicitors, where it provides, that general elections shall be held for county solicitors "in such counties where there are solicitors whose offices are elective," thereby showing a legislative intent to except from the operation of the statute county solicitors who were appointed, invoking the rule, that the expression of one thing is the exclusion of another; that an intention is thus shown to include within the operation of the statute Boards of Revenue, or Courts or Boards of like jurisdiction, throughout the State, whether any of such boards are appointive or elective. We cannot consent to such conclusion. The rule is merely one of construction and is not one of universal application. "If there is some special reason for mentioning one, and none for mentioning the other, the absence of any mention of the latter will not operate as exclusive."—Sedgwick on Construction of Statutes, p. 31.

Moreover, the expression of an intention in relation to the election of county solicitors, to include within the operation of the statute only such county solicitors whose offices were elective, might be said, as argued by counsel for appellee, as tending to show an intention on the part of the legislature to confine the operation of the statute to elective offices and preserve the appointive ones it had deemed necessary to meet local needs.

It is a familiar principle that repeals by implication are not favored. The intention of the lawmakers is the thing to be ascertained, and when the intention to repeal the former statute is not expressed in the latter, unless such intention otherwise clearly appears, a repeal of the former statute will not be implied. The subject as expressed in the title of the general law of October 9th; "To further regulate elections in the State of Alabama," does not necessarily imply an intention or purpose to change an appointive office into an elective one; on the

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contrary the title of the Act would rather afford an inference of a purpose to deal with elective offices. We are not, however to be understood as intimating that it would or would not be competent, under the title to provide in the body of the Act for election to office theretofore appointive.

From the fact that the general Act of October 9th has a field of operation outside of Montgomery county; the fact that it must be presumed that the local Act of February 28th providing for the appointment of the Board of Revenue of Montgomery county was made necessary by local needs; the fact that both Acts were passed at the same session, and the fact that the general Act does not expressly repeal the special one; and failing to discover or see any thing in the Act of October 9th clearly indicating an intention to repeal the local Act, we feel constrained to hold, under the authorities cited above in this opinion, that the Act of February, 28th, providing for the appointment of the Board of Revenue of Montgomery county was not repealed wholly nor in part by the general Act of October 9th, regulating elections in the State of Alabama.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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Quo Warranto Proceedings as to Office of County Superintendent of Education.

1. *Constitutional law: detention of general law contra-distinguished as to local law.*—A law that is general in its terms and is in good faith so framed, that parts of the State may come within its operation, is a general law within the meaning of the constitution; and the fact that at the time of its passage there may be in the State certain localities where there are no objects for its present operation, or where there are special

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laws already in existence, which must be repealed before the general law becomes operative therein, does render such law any the less general law.

2. *Same; the general election law a general and not a local law.*

The act of the Legislature providing for the holding of general elections in the State of Alabama (Acts, 1903, p. 438), is not rendered a local law by the reason of the provision of section 106 of said Act which provides that the provisions thereof should apply to all primary elections, and all elections by counties and municipalities held in the State, "except in cases where the provisions thereof are inconsistent, or in conflict with the provisions of a law governing special primary, county or municipal elections."

3. *Constitutional law; when term of office of County Superintendent of Montgomery County expires.*—Under the Act "to provide for the election of the County Superintendent of Education of Montgomery County," approved Feb. 7th, 1899, (Acts, 1898-99, p. 676), providing that the County Superintendent of Education of Montgomery County should be elected at the general election to be held on the first Monday in August, 1900, and at the general election every four years thereafter

• in the same manner as the other officers are elected; and that the term of office of said County Superintendent "shall begin on the first day of October next following such election and that he shall hold said office * * * * * under the laws governing public schools, and until his successor is duly qualified," a change of time in the holding of the general election in the State to November, has the effect only to postpone the time of the change in the office of County Superintendent of Education of Montgomery County until the new officer can be elected at the general election in November, and until he has qualified—the old officer simply holding over until his successor has been elected at the general election in November, and has qualified thereafter.

APPEAL from the City Court of Montgomery.

Heard before the HON. A. D. SAYRE.

The proceedings in this case were had on an information in the nature of *quo warranto* filed by the State of Alabama on the relation of G. W. Covington against J. A. Thompson, on Nov. 24th, 1904.

In the petition it was averred that the relator was a resident citizen of the county of Montgomery and State of Alabama, and had been such for a number of years;

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that the office of County Superintendent of Education for Montgomery County was an office established by an act the Legislature of Alabama, approved Feb. 27, 1899; that in said Act it was provided that the County Superintendent of Education of Montgomery County should be elected at the general election to be held on the first Monday of August, 1900, and at the general election every four years thereafter; and that the term of said office should begin on the first day of October next following such election, and that the person elected should hold such office and perform all the duties thereof under the laws governing public schools, and until his successor was duly qualified.

It was then averred that on the first Monday in August, 1900, the respondent, J. A. Thompson, was elected County Superintendent of Education for Montgomery County, and on the first day of October, 1900, entered upon the discharge of his duties as such, after having been duly qualified and received his commission, and that at the time of filing the petition the term of office of said J. A. Thompson had expired, and his right to hold said office had ceased; that on the 8th day of November, 1904, at a general election held in Montgomery County, in the State of Alabama, the relator, G. W. Covington, was elected County Superintendent of Education for Montgomery County, and on the 15th day of November, 1904, he made his bond and duly qualified as such County Superintendent of Education, and there was issued to him a commission signed by the Governor and Secretary of State; that after so qualifying and having a commission issued to him, the relator called upon J. A. Thompson and demanded possession of the books and papers relating to the office of Superintendent of Education of Montgomery County; and that he be allowed to exercise the duties of said office; that, notwithstanding such demand, the said Thompson refused to comply therewith, and that the said Thompson, at the time of the filing of the petition, was usurping and unlawfully holding and exercising the said office of County Superintendent of Education of Montgomery County.

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It was then averred that the right of said J. A. Thompson to hold said office, or exercise any of its powers, duties or privileges terminated upon the relator's qualifying as County Superintendent of Education, as hereinabove stated; and that by virtue of his said election and qualification the relator is entitled to hold said office and exercise all of the powers, duties, privileges and liberties of the same.

The prayer of the petition was that process issue, requiring the respondent, J. A. Thompson, to appear and answer, and show by what warrant he claims to exercise and enjoy the powers, duties and privileges of the office of County Superintendent of Education of Montgomery County and that upon a hearing of said cause, judgment may be rendered, excluding the said J. A. Thompson from said office and declaring that the relator, G. W. Covington, was entitled to the same.

The respondent filed an answer, in which he averred the following facts: That he was duly elected County Superintendent of Education of Montgomery County on, to-wit, the first Monday in August, 1900, and took the oath of office and gave bond and otherwise complied with the provisions of law and entered upon the discharge of the duties of said office on, to-wit, the 1st day of October, 1904, no successor to him had been elected, and the State Superintendent of Education called upon him to give a new bond with sureties as such County Superintendent of Education, which he did in all respects as required by law, which said bond was duly approved and he continued to act as such County Superintendent. For further answer, this respondent saith that under the law his term of office began on October 1st, 1900, and continues till his successor is duly qualified. That G. W. Covington was elected County Superintendent of Education of Montgomery County at the general election held on to-wit, the 8th day of November, 1904, and that under the law his term of office begins on the 1st day of October next following such election, and on to-wit, the 1st day of October, 1905, and that until such date the said Covington's term does not begin and he has no right to be inducted into said office. Demurrers were filed by the

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petitioner to this answer which demurrers were overruled; but under the opinion on the present appeal it is unnecessary to set out these demurrers in detail.

After the overruling of the demurrer of plaintiffs to the answer of the defendant, J. A. Thompson, as shown by the judgment entry, the following evidence was introduced: It was proven that the relator, G. W. Covington, was over forty years of age, and was a resident citizen of the county of Montgomery, and had been such citizen of the county of Montgomery and State of Alabama, and of the United States, and a qualified elector in said State and county, and for more than fifteen years last past, and still is such a citizen, resident and qualified elector; that the office of county Superintendent of education of Montgomery county was an office established by the legislature of the State of Alabama, and that by an act of the legislature of Alabama, approved February 7th, 1899, it was provided that the county superintendent of education of Montgomery county should be elected at the general election to be held on the first Monday in August, 1900, and at the general election every four years thereafter, as the other county officers are elected; that the term of the office of county superintendent of education should begin on the first day of October next following such election, and that he should hold such office and perform all the duties thereof under the laws governing public schools, and until his successor is duly qualified.

That J. A. Thompson was elected county superintendent of education of Montgomery county at the general election in August, 1900, and on the first day of October, 1900, entered upon the discharge of his duties as such, having taken the oath of office, given bond and otherwise complied with the provisions of law regarding the same. That on the first day of October, 1901, no successor to him had been elected, and the State Superintendent of Education called upon the said Thompson to give a new bond with sureties, as such county superintendent of education, and in all respects as required by law, which said bond was duly approved, and he continued to act as such county superintendent of education; and that on the

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8th day of November, 1904, at the general election for the State of Alabama, and held in the county of Montgomery, G. W. Covington was elected county superintendent of education for Montgomery county, Alabama, and on the 15th day of November, 1904, he made his bond and qualified by taking the oath of office, and did everything else requisite to said qualification; that on said last named date his bond as such county superintendent of education was approved by the judge of probate of Montgomery county, Alabama, and a certified copy of said bond was on said date filed with the State superintendent of education, and a commission issued to him, the said Covington, by the governor and secretary of state of the State of Alabama, as such superintendent of education for Montgomery county, Alabama, on said last named date. That immediately thereafter, and before the filing of the petition in this case, the said Covington called upon the said Thompson and demanded possession of the books and papers relating to the said office, and demanded to be placed in charge of the same, and to be allowed to exercise the duties of said office, but notwithstanding this demand the said Thompson refused to do so, and continues to act as such county superintendent of education.

Upon the introduction of all the evidence, the court rendered a judgment declining to grant the relief prayed for, and ordering the petition dismissed. From the rendition of this judgment the relator duly excepted.

The relator appeals and assigns as error the overruling of the demurrer to the respondent's answer, and the judgment of the court refusing to grant the relief prayed for, and dismissing the petition.

STEINER, CRUM & WEIL, for appellants.—As soon as relator, said G. W. Covington, qualified, after his election in November, 1904, he was *eo instanti* entitled to the office. Where an act of the legislature provides for the election or appointment of officers at fixed intervals, without providing when the officers shall go into office, the term of office commences immediately upon the election, or as soon thereafter as the officer qualifies.—23

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Am. & Eng. Ency. Law, (2d ed.) p. 411. and his term of office continues until the next period for election or appointment.—23 Am. & Eng. Ency. Law, (2d ed.) p. 413.

In the case of the *State ex rel. Simpson v. May*, 49 Ala. 376, it was held where the court was construing a similar law that the expressions used in the general election law fixes the term of office; and, if this be true, then the theory upon which the learned judge below based his opinion was erroneous. See also *Attorney-General v. Lamplough*, 3 Eng. Law Rep. ex. D. 227; *Savings Bank v. Collectors*, 3 Wall N. S. 495; *Ex parte Crowe*, 109 U. S. 556; *Ogden v. Boreman*, 20 Utah 98. "If a statute or constitutional provision, fixing or limiting the duration of an official term is ambiguous, that interpretation should be followed which limits the term to the shortest time."—23 Am. & Eng. Ency. Law, 409.

The appellee having held the office for the full period, he is estopped from denying that his term of office has expired.—23 Am. & Eng. Ency. of Law, 417, 418.

RAY RUSHTON, *contra*.—The act to provide for the election of the county superintendent of education of Montgomery county, (Acts 1898-99, p. 676), fixed the term of the office of the county superintendent, and provided when the person elected to such office should enter upon the duties thereof—the 1st of October next succeeding the general election. The act of 1903, to regulate elections, says nothing about the terms of office of any particular officer. It does not purport to repeal, nor does it repeal, any part of the act above quoted. The act says that the county superintendent must be elected at the general election to be held on the first Monday in August, 1900, and at the general election every four years thereafter, and the only effect that the act of 1903 has on this act, is that it changed the general election to be held every four years to November instead of August. No specific term being fixed by the act, except by the implication that his office should expire when the new term begins, it seems very clear that Covington's term does not begin until the 1st day of October next following the

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general election held in 1904, and that Thompson's term of office does not expire until his successor is duly qualified. Covington is not "duly qualified" until his term of office begins. The act above quoted is complete within itself, and the general election law, as above stated, does not amend or repeal any of its provisions, nor does it attempt to do so.

Legislative intent can only be gathered from the words of their legislative acts, unless there is something indefinite and inconsistent in them, but where every provision of an act can be given operation, there is no room for any construction. This act simply falls in, by reason of its own wording to the changed condition of affairs, brought about by the changed date of the election, and adjusts itself accordingly, and there is nothing in the constitution or laws to prohibit its so doing. "Statutes may be repealed by implication; the courts do not, however, favor such repeal, and if by a fair and reasonable construction of the latter and former statute, the two can be reconciled, and each left to operate, that construction will be adopted.—*Smith v. Speed*, 50 Ala. 276; *Iverson v. State*, 52 Ala. 170; *Enloe v. Rike*, 56 Ala. 500; *Parker v. Hubbard*, 64 Ala. 203; *Cook v. Meyer*, 73 Ala. 580; *Roberts v. Pippin*, 75 Ala. 103; *Jackson v. State*, 76 Ala. 26; *Herr v. Seymore*, 76 Ala. 270; *Jones v. Drewry*, 72 Ala. 311; *Lehman v. Robinson*, 59 Ala. 219; *Ex parte Dunlap*, 71 Ala. 73.

"When the words are plain, and unambiguous, there is no room for a construction or interpretation; the legislature must be intended to mean what they clearly expressed."—*Carlisle v. Godwin*, 68 Ala. 137; *Reese v. State*, 73 Ala. 18; *Lehman v. Robinson*, *Ib.*

SIMPSON, J.—In order to get a clear idea of the legal status of this case, we will state first the substance of the various statutes relating to county superintendents of education, going as far back as necessary to an understanding of the case: Under the Code of 1876 and 1886, they were all appointed by the State superintendent, and their terms commenced on the 1st of October of each odd year, and continued for two years, and until their suc-

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cessors should qualify.—Code of 1876, §§ 907, 916; Code of 1886, §§ 954, 955.

On February 13, 1889, an act was passed providing that county superintendents should be elected at the general election to be held on the first Monday in August, 1890, and every two years thereafter, at the general election, in the same manner as the other county officers, their terms of office to begin on October 1, 1890. *Provided*, that this act should not apply to Montgomery and several other counties named.—Acts 1888-9, p. 396.

The Code of 1896, then, following this act, provided that “unless by special act it is otherwise provided, a county superintendent for each county is elected at each general election as provided in this Code.”—§ 3550 (954). The section provides that “the term of office of county superintendents who are elected shall commence on the first day of October next after their election, and the term of those appointed shall commence on October 1st of each odd year,” and “in each case shall be for two years, and until their successors shall qualify.”—§ 3551 (955).

The same Code provides for general elections on the first Monday in August, and that a county superintendent shall be elected, except in cases otherwise provided for by special laws, on the first Monday in August, 1898, and every two years thereafter.

On February 7th, 1899, “An Act to provide for the election of the county superintendent of education of Montgomery county,” was passed, providing that said superintendent should be elected at the general election to be held on the first Monday in August, 1900, and at the general election every four years thereafter, in the same manner as other officers are elected. “And that the term of office of said county superintendent of education shall begin on the first day of October next following such election, and that he shall hold said office and perform all the duties thereof, under the laws governing public schools, and until his successor is duly qualified.”

As stated in a case recently decided by this court, the words “until his successor is elected and qualified” (or as in this case, “until his successor shall qualify”) were

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never intended to prolong the term of office beyond a reasonable time, after the election to enable the newly elected officer to qualify."—*Prowell v. State, ex rel Hasty*, decided at the present term.

We held also, in that case, that the election law (Acts 1903, p. 438) did not change the term of office of any officer. The fact that, in that case, the party holding was in the occupation of a constitutional office does not affect the principle above alluded to. Hence, it follows that, whatever may be the rights of the relator, the official term of the defendant terminated not later than a reasonable time after the 1st of October, 1904.

But it is claimed that the entire election law is a local law, under § 110 of the Constitution, and consequently could not be enacted without the notice required by § 106 of the Constitution. This contention is based on the fact that § 106 of the act states that "All the provisions of this act shall apply to all primary elections and all elections by counties and municipalites held in this State, except in cases where the provisons hereof are inconsistent or in conflict with the provisions of a law governing special primary, county or municipal elections." So the question arises, first, is the general election law a general law or a local law?

Constitutions are made for practical purposes, and not merely for the exercise of critical gymnastics, and in the construction of them we are to take into consideration the conditions which confronted the constitution-makers, and we are, if possible, to give the instrument such construction as will carry out the intention of the framers, and make it reasonable rather than absurd.

At the time of the adoption of this Constitution there were, in existence in the State of Alabama, a great many local laws, many of them wise and desirable to the people of the locality, and the very fact that the same Constitution provided a way by which the people could have more local laws enacted, shows that it was the policy of the State to continue many local laws in force. Can it then be, for a moment, supposed that the constitution-framers intended that no general law could ever be enacted, making provisions different from these local laws,

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without repealing all of them? For that would be the inevitable result, if it be acknowledged that the fact that the exception in favor of existing local laws, renders the law a local and not a general law.

We have not been able to find, in any State constitution, a section just like ours, which defines what a general law is, but, before the adoption of our Constitution, our own Supreme Court, and some others had defined a general law, in just about the terms of our Constitution. *Holt v. Mayor & Aldermen of Birmingham*, 111 Ala. 369, 373.

While the decisions of other States are not in harmony as to the practical working of a general law, under these definitions of it, yet it is evident that to give this constitutional provision too strained and strict a construction would practically block the wheels of legislation.

We could not pass any general law to protect the pine forests of Alabama, because there are no pine forests in some of the counties; we could not legislate in regard to the public schools in the counties of Alabama, because Mobile county is, by the Constitution, excepted from the provisions of any such act; nor could we enact any law in regard to railroads in Alabama, because there are some political subdivisions of the State which have no railroads.

While, as we have intimated, there are decisions in some of the States, which indicate so strict a construction of similar constitutional provisions, as to result in such a state of affairs, as above alluded to, yet, in taking up this new provision of our Constitution, we prefer to follow authorities which we hold to be based on sounder reason, and to give to this constitutional provision such a construction as will effectuate the intention of its framers, and, at the same time, give it a practical interpretation, which will make it useful and not harmful to the interests of the State.

The Supreme Court of New Jersey, in discussing a case, in which the question of local or general law was at issue (and in which it considered that it should "emancipate itself" from the bondage of verbal definitions) uses this language: "When we find that the adoption of the

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narrow signification of the term used will lead to positive absurdity, and that the reception of the word in its wider import is attended with the establishment of a rule of public policy, both wise and salutary, it is not difficult to make choice between the alternatives.”—*Van Riper v. Parsons*, 40 N. J. L., p. 5.

And, in the same case on second appeal, in deciding that the law, general in its terms, “abating legislative commissioners for the regulation of municipal affairs wherever they existed,” was a general and not a local law, notwithstanding there was but one city in the State having such commission, says “The law, in all its provisions, is general; *broad enough to reach every portion of the State.* * * * A law so framed is not a special or a local law, but a general law.”—*Van Riper v. Parsons*, 40 N. J. L. 125.

And the same court held that an act providing for the district courts in all cities of 15,000 inhabitants or more, and an amendment thereto raising the population required to 20,000, were both general laws, because it was a proper classification and did not omit any subject or place naturally belonging to such class, although the amendment affected only one city.—*Rutgers v. New Brunswick*, 42 N. J. L. 51.

The Supreme Court of Pennsylvania, under a constitution prohibiting the passage of “any local law” on certain subjects, sustained an act in regard to the bonding of cities of certain population, and the court says: “It is true the only city in the State, at the present time, containing a population of 200,000 is the city of Philadelphia * * * Pittsburg is rapidly approaching that number * * * Legislation is intended not only to meet the wants of the present, but to provide for the future.” And after mentioning the various instances in which general public interests along certain lines must be provided for by general laws, classifying the subjects of legislation, the court says “we will not presume that the framers of that instrument, or the people who ratified it, intended that the machinery of their State government should be so bolted and riveted down by the fundamental law as to be unable to move and perform its

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necessary functions.”—*Wheeler v. Philadelphia*, 77 Penn. St. 338, 349, 351.

The Ohio Supreme Court held that an act requiring certain things of owners of street cars, was a general law and of “uniform operation throughout the State,” and goes on to show that a statute is of uniform operation, if its terms make it applicable to all of a certain class in the State, though in certain localities there be none of that class, but whenever they come into existence the general law applies to them.—*State v. Nelson*, (51 Ohio St.) ; 26 L. R. A. 317, 319.

And so in a case in California, where an act made a change in the police courts in cities of certain population, and provided that it should go into effect in each one, at the expiration of the various terms of incumbents, and it was claimed that it was not of uniform operation, because it took effect at one time in one city and at another in another. The law was sustained, and the court says, “If the law operates equally upon all the objects embraced within it, *when they come within the circle or scope of its authority*, the uniformity of operation contemplated by the constitution is attained.”—*People v. Henshaw*, 76 Cal. 436, 444.

Then coming to the particular provision of our own Constitution (§ 110), to-wit, that a general law is a law which applies to the whole State: One of the definitions of the word “apply” is to declare, or pronounce, as suitable.—Webster’s International Dic. Every criminal statute applies to every individual in the State, yet it does not become effective in its application to him until he brings himself into actual contact with it, by committing some crime.

Following the reasoning of the cases cited, we hold that, under the wording of said section of our Constitution, a law which is general in its terms, and is, in good faith, so framed that all parts of the State may come within the circle of its operation, is a general law. And the fact that, at the time of its passage, there may be, in the State, certain localities where there are no objects for its present operation, or where there are special laws already in existence which must be repealed before the

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general law becomes operative therein, does not render it any the less a general law.

Consequently the election law of 1903, is a general law, even if it be admitted that § 106 of that law is intended to except out of its operation those localities which have special election laws, as to certain officers, which is by no means clear, but which would be the result if they were not mentioned at all, unless there was a clear intent shown to repeal them.

It may be said also, even under the contention of the appellee as to the status of the county superintendent in Montgomery county, and others in the same attitude, this law does apply to the whole State. While it is true that, if under that special law the county superintendent holds for four years, the general election law would not change the term of his office, yet it would change the date of his election, as that special act refers to the general election law, as to the time and manner of his election, so that, to that extent, at least, the general law applies to the election of county superintendents in Montgomery county, besides applying to it and every other county in provisions on the subject of election of other officers.

We hold that the principles announced in the Prowell case are applicable to county superintendents, whose terms, under the previous law, expired on the 1st of October, after the August election, and that the effect of the change of the time of election, only postpones the time of the change of officers until the new officer can be elected and qualified, the old officer simply holding over until his successor has been elected and qualified.

In the case now before the court, the statements of the various statutes in the former part of the opinion, shows that the position of county superintendent in Montgomery county is not even as favorable as those holding under the general law, for the act of February 13th, 1889, simply left the Montgomery superintendent where he was before, enjoying a two years' term, by appointment, in place of by election; and the act of February 7, 1899, simply applied the elective feature to him, providing that he should be elected on the first Monday in August, as

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other officers at the general election, thus practically eliminating the local features and placing him on the same platform as other superintendents; for the title of that act does not contain any intimation of a purpose to change the term of his office. Consequently that part of the act falls to the ground, and appellee's term of office really expired two years before the first day of October, 1904.

The judgment of the court is reversed and a judgment will be here entered, declaring that the appellee, J. A. Thompson, is not entitled to hold the office of superintendent of education of Montgomery county, but that the relator, G. W. Covington, is entitled to said office.

Reversed and rendered.

MCCLELLAN, C.J., HARALSON, TYSON, DOWDELL, ANDERSON and DENSON, J.J., concurring.

State v. Stallings.

Appeal from Order of the Chancellor, on Habeas Corpus Proceedings, admitting Petitioner to Bail.

1. *Res gestae; what acts and declarations admissible as.*—Acts and declarations to be admissible as *res gestae*, must be substantially contemporaneous with the main fact and so closely connected with it as to illustrate its character.
2. *Same; same; case at bar.*—Evidence which is offered to prove that after defendant, who was seriously wounded, had been removed to a drug store, and about five minutes after the shooting upon being informed that the person he assailed was dead, he said, "I have done what I always intended to do, and am ready to die," is inadmissible as a part of the *res gestae*.
3. *Confessions are prima facie inadmissible; predicate must be established for the introduction thereof.*—All confessions are *prima facie* not admissible as evidence, and a predicate must be laid for the introduction of a statement by defendant as a confession.

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APPEAL from the Chancery Court of Butler.

Tried before the Hon. W. L. PARKS.

This was a petition filed in the chancery court of Butler county by J. F. Stallings, in behalf of Dan alias Daniel Stallings, as follows: "Your petitioner, J. F. Stallings, most respectfully represent unto your honor that Dan alias Daniel Stallings, in whose behalf this application or petition is made, is illegally imprisoned, and restrained of his libetry and held under guard in the Elk Hotel, in the city of Greenville, Alabama, by one J. H. Hartley, who is the sheriff in and for said county and State, by virtue of a warrant charging said Dan alias Daniel Stallings with murder in the first degree, said warrant issued by I. Y. Trawick, clerk of the circuit court, in said county of Butler, and State of Alabama, a copy of which said warrant is hereto attached and marked Exhibit "A," and made a part of this petition, and with leave of reference thereto, as often as may be necessary. And petitioner alleges that the said Dan alias Daniel Stallings was indicted by the grand jury of said county at the October term, 1904, a copy of which indictment is hereto attached marked Exhibit "B," and made a part hereof, for the offense of murder in the first degree, and no bond has been set by any court or application made therefor, and your petitioner further avers that the proof is not evident or the presumption great that the said Dan alias Daniel Stallings is guilty of a capital offense. Wherefore, your petitioner prays for a writ of *habeas corpus*, directed to the said J. H. Hartley, sheriff of Butler county, Alabama, commanding him to bring the body of the said Dan alias Daniel Stallings before your honor at a day and place to be by your honor appointed, together with the cause of detention of the said Dan alias Daniel Stallings."

On the trial, under the writ which was issued by the court, the evidence showed that the defendant shot and killed Radford Buckhaults, on or about October 1, 1904, at Greenville, Alabama, and was at the same time himself wounded, being shot in the left side; the evidence for the defense showed that the deceased was in a bar-room on the evening of the killing, and when the defend-

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ant walked in, the deceased insulted him; that defendant said nothing, but soon left, and about 7 o'clock was passing up the sidewalk and the deceased was sitting in a buggy near the side-walk and cursed the defendant again, applying an opprobrious epithet to him. The defendant thereupon walked near the point where the deceased was sitting in the buggy and asked him if he was cursing him; the deceased replied that he was and that he intended to kill him, and, according to the testimony of the defense, shot the defendant before he (the defendant) had drawn or attempted to draw a weapon. The State introduced testimony to the effect that, beginning with the marriage of his sister to deceased, the defendant, up to within a short period of the killing, had made threats that he would take the life of the deceased; that defendant followed deceased from the bar where the first altercation took place. The State also introduced evidence tending to contradict other statements of the witnesses for the defense. The State offered to introduce testimony showing that the defendant, about five minutes after the shooting, as he was being moved into Peagler's drug store, stated, upon being informed that Buckhaults was dead, that he (defendant) had done what he always intended to do, and that he was ready to die. The petitioner objected to this testimony. The court sustained the objection, and the State reserved an exception to that ruling. The chancellor rendered a decree allowing bail to the defendant in the sum of three thousand dollars, from which decree the State appeals and assigns the rendition of such decree, and the rulings of the chancellor on the evidence, to which exceptions were reserved, as error:

MASSEY WILSON, Attorney-General, and POWELL & HAMILTON for the State, cited *Ex parte Nettles*, 58 Ala. 268; *Mitchell v. State*, 60 Ala. 26.

STEINER, CRUM & WEIL, RICHARDSON & PEARSON, and STALLINGS & NESMITH, *contra*, cited *Ex parte Brown*, 65 Ala. 448; *Hornsby v. State*, 94 Ala. 67; *Compton v. State*, 110 Ala. 37; *Smith v. State*, 83 Ala. 28; *Ex parte Hammock*, 78 Ala. 416.

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ANDERSON, J.—Upon the hearing of this petition before the chancellor, the State offered to prove by witnesses that after defendant, who was seriously wounded, had been removed to Peagler's drug store, and about five minutes after the shooting, upon being informed that Buckhaults was dead, said, "I have done what I have always intended to do, and am ready to die." This evidence was objected to by defendant, and the objection was sustained by the chancellor.

"Acts and declarations to be admissible as *res gestae* must be substantially contemporaneous with the main fact and so closely connected with it as to illustrate its character."—*Fonville v. State*, 91 Ala. 39; Mayfield's Digest, Vol. 1, p. 772. We do not think this evidence was admissible as a part of the *res gestae*.

There was no predicate for the introduction thereof as a confession. All confessions are *prima facie* not admissible as evidence.—Mayfield's Digest, Vol. 1, p. 206. The action of the chancellor in excluding this evidence was proper.

The order of the chancellor granting the petitioner bail is affirmed.

MCCLELLAN, C.J., TYSON and SIMPSON, J.J., concurring.

Ex parte Merritt.

Petition for Mandamus.

1. *Mandamus; not awarded for ordering vacation of chancellor's decree, dismissing a bill in equity.*—Where upon a motion made by some of the defendants in a chancery suit to dismiss the bill for the want of equity, the chancellor renders a decree, granting said motion, and ordering the bill dismissed, the complainant cannot obtain a writ of mandamus, ordering the vacation of said order of dismissal, and the restoration of said defendants as parties to said bill.

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APPEAL from the City Court of Montgomery in Equity.
Heard before the Hon. A. D. SAYRE.

The facts in this case are sufficiently stated in the opinion.

GUNTER & GUNTER, for petitioner.—Mandamus is the proper remedy to compel the vacation of a decree dismissing a bill as to several defendants, as there is no adequate remedy prescribed by appeal, and there may be a failure of justice otherwise.—Code, 427 and citations; *Ex parte Fecheimer*, 103 Ala. 154 (discharging injunction); *Bridgeport v. Bridgeport, etc.*, 104 Ala. 276, (order to enforce judgment); *Ex parte Sayre*, 95 Ala. 288, (discharging an injunction); *Ex parte S. & N. Ry.*, 65 Ala. 599.

WHITSON & DRYER, J. M. FALKNER and GEORGE W. JONES, *contra*.

SIMPSON, J.—It appears from the record that the petitioner, Fisher H. Merritt, filed a bill in the city court of Montgomery, sitting in equity, against the Alabama Pyrites Company, Percival H. Smith and O. A. Smith, in connection with other defendants, that said parties filed in said court a motion to dismiss said bill as to them, on the grounds therein stated, that, upon the hearing of said motion, a decree was rendered to the effect that said bill, so far as it sought relief against said parties was without equity, and “that the same do stand dismissed, at the cost of complainant.” The petitioner prays for a writ of mandamus “ordering the vacation of said order of dismissal, and the restoration of said defendants as parties to said petitioner’s bill.”

The writ of mandamus is a remedial writ granted where there is a specific legal right, and there is no other legal remedy which is adequate for the enforcement of the right. In its application to judges, and judicial proceedings, while cases sometimes touch so closely on the border line as to render it difficult to harmonize them all, on a clear line of principle, yet there is a great uniformity in stating what that principle is, to-wit: that

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the sole office of the writ is to force the judge to act, and not to direct him to render a particular judgment. It can compel him to hear and decide a controversy which is within his jurisdiction, but it cannot direct or control the exercise of his judicial discretion. It is not its office to correct errors.—14 Am. & Eng. Ency. Law (2d ed.) p. 113; *Ex parte Jones*, 1 Ala. 15; *State of Ala. ex rel Pinney v. Williams*, 69 Ala. 311, 316; *Ex parte The City Council of Montgomery*, 24 Ala. 98; *Ex parte Elston*, 25 Ala. 72; *Ex parte Parker*, 120 U. S. Rep. 737, 743; *Lamar v. Commissioners' Court*, 21 Ala. 772, 778; *Appling, Judge of Probate v. Bailey, Assignee*, 44 Ala. 333.

It has been allowed, in cases where a non-resident, under the old statute, failed to give security for costs, to force the dismissal of a case, because this was an absolute right, given by statute, and there was no remedy by appeal.—*Ex parte Cole*, 28 Ala. 50; *First National Bank of Anniston v. Cheney*, 120 Ala. 117.

In the last cited case Chief Justice BRICKELL states that as a general rule "mandamus will not be granted for the correction of an error, arising in the progress of a suit, which can be revised on appeal after final judgment," and goes on to show that these cases have been made an exception to the general rule, because the defendant had not adequate remedy, if he is forced to litigate with a non-resident, without the indemnity against costs which the statute guarantees to him, as absolute right.

It has been granted where a case had been, without authority of law, stricken from the docket, in order to reinstate the same.—*Ex parte State ex rel. Stow*, 51 Ala. 69. Also where a court, under an unconstitutional ordinance set aside a judgment, rendered at a previous term. *Larson v. Moore*, 44 Ala. 275. Also where a court, without authority of law, at a subsequent term, set aside and vacated a final decree rendered at a previous term, for the purpose of reinstating the same; as the court had no jurisdiction or control over the decree, after the expiration of the term at which it was rendered.—*Ex parte Cresswell*, 60 Ala. 378; *Cochran v. Miller*, 74 Ala. 50.

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Also to reinstate a case which was improperly allowed to abate after the death of the plaintiff, because the heirs or personal representatives had a specific right to be made parties and prosecute the suit, and after the suit was abated had no standing in court to remedy the matter either by appeal or otherwise.—*The State ex rel Nabors' Heirs*, 7 Ala. 459.

Also to reinstate an ancillary attachment, improperly dismissed, without notice to the defendant.—*Boraim v. DaCosta*, 4 Ala. 398.

Also where the court required plaintiff to remit the amount of \$1,000.00 damages assessed by the jury, or a new trial would be granted on payment of costs, and, after failure to remit the \$1,000.00, and after the costs had been paid, by the other party, the case was stricken from the docket, as this was "not technically speaking a judgment," and not revisable.—*Stephenson v. Mansony*, 4 Ala. 317, 320. Also where a case, still *sub judice* was improperly stricken from the docket.—*Ex parte Lowe*, 20 Ala. 330.

On the other hand it has been denied for the purpose of reinstating a bill which had been dismissed on account of the plaintiff's failure to secure costs, because if erroneous it could be corrected on appeal.—*Ex parte Hendree*, 49 Ala. 360.

And it has also been denied where the action of a probate judge in issuing a liquor license was sought to be overturned, the reason being that he acted judiciously, and the exercise of that judicial power could not be controlled by mandamus.—*Dunbar v. Frazer*, 78 Ala. 538, and cases there cited.

From all these cases, and others which might be cited, we can find no warrant for interfering, by mandamus, in a case where a motion to dismiss a bill for want of equity and other grounds, has been regularly entertained by a judicial officer in a case within his jurisdiction, and a decree rendered passing upon the equity of the bill, and dismissing the bill, when the matter complained of can be revised on appeal, either under the statute in regard to interlocutory decrees, or from the final decree in the case. Without expressing any opinion, as to the

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right of appeal in this case from the interlocutory decree, there is no doubt that the matter can be revised on appeal from the final hearing of the case.—*Ex parte Woodruff*, 123 Ala. 99; *Bickley v. Bickley*, 129 Ala. 403.

The petition for a writ of mandamus is denied.

MCCLELLAN, C.J., TYSON and ANDERSON, J.J., concurring.

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Action to recover Damages for Personal Injuries.

1. *Averment of negligence; sufficiency thereof.*—A count that avers that the train of cars upon which plaintiff was in discharge of his duties as a brakeman was derailed, and plaintiff thereby injured, in consequence of its being run by the engineer at a rate of speed which was dangerous and reckless, contains a sufficient averment of negligence.
2. *Action for negligence; sufficiency of complaint; averment of name of party to whose negligence injury is imputed.*—In an action against a railroad corporation by an employe thereof to recover damages for personal injuries, where it is alleged in the complaint that the injury was caused by defects in the track of the defendant, which defect arose from or had not been discovered or remedied owing to defendant's negligence or the negligence of some person entrusted by defendant with duty of seeing that the track was in proper condition, it is not necessary to aver the name of the person so entrusted with such duty.
3. *Same; same; same; plaintiff need not aver that he had made diligent effort to ascertain negligent engineer's full name.*—A count alleging that plaintiff's injuries were caused by the negligence of ——— Gould, whose given name is unknown to plaintiff and who was the engineer in charge of the locomotive pulling the train, upon which plaintiff was employed as brakeman, and that said engineer so negligently and carelessly managed his engine as to throw some of the cars from the track, resulting in the injury to plaintiff, suffi-

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ciently charges negligence; and it in effect avers the surname of the engineer and that his christian name is unknown to the plaintiff. It is not necessary for plaintiff to aver that he had made diligent effort to ascertain the engineer's full name, but had failed to ascertain it.

4. *Expert testimony; competency to testify as to condition of railroad track.*—A witness who is shown to be skilled and experienced in respect of track conditions and track constructions, is competent to give opinions as to the defective and unsafe condition of a railroad track.
5. *Same; case at bar.*—A witness who had had long experience as a brakeman, whose duties had to do with the regulation of the speed of the train under the varying circumstances incident to a railway, according to curve, grade, etc., is qualified to give his opinion on each of these matters, and to state that a train, at a particular time and place, was running at a dangerously high speed.
6. *Motion for a new trial on ground that verdict was contrary to evidence.*—Where each count of a complaint is supported by tendencies of the evidence, which make a case, under each, for the determination of the jury, a motion for a new trial on the ground that the verdict was contrary to or not sustained by the evidence, is properly overruled.
7. *Proof of averment in complaint; common knowledge of jury.* An averment in a complaint that "the rails were insecurely fastened to the cross ties" is sufficiently proved, if the evidence shows that ties were rotten, the jurors common knowledge being sufficient to afford them necessary assurance that rotten wood will not hold a rail or spike.
8. *Defective track conditions; trainmen do not assume risks thereof.* It is not the duty of trainmen but of other employees to see that the track is safe and kept in proper condition, and, therefore, trainmen do not assume the risk of defective track conditions.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. ED B. ALMON.

This was an action brought by the appellee, R. E. Shea, against the appellant, The Northern Alabama Railway Company, to recover \$1,999, as damages for personal injuries sustained by the plaintiff, while acting as a brakeman in the service of the appellant corporation. The 5th, 6th and 8th counts of the amended complaint (demurrers having been sustained to the other counts) con-

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tain the following averments: (5.) "And plaintiff avers that his injuries resulted from the negligence of ——— Gould, whose given name is unknown to the plaintiff, and who was the engineer in charge of the engine which was pulling a train of cars on the defendant's road, and said negligence consisted in this: the said engineer was running said engine and train of cars at a dangerous and reckless rate of speed, so that some of the cars were derailed and plaintiff was thrown from the top of a car and damaged as aforesaid." (6.) "And plaintiff avers that his injuries were caused by a defect in the track then and there used by the defendant, which defect consisted in this, to-wit: the rails of the track were old and worn, the cross-ties rotten, rails insecurely fastened on the cross-ties; the track was insufficiently ballasted so that on account of said defect some of the cars were derailed, and plaintiff was thrown from the top of a car and suffered damages as aforesaid; and plaintiff avers that said defect rose from or had not been discovered or remedied owing to the defendant's negligence, or the negligence of some person in the service of the defendant, and intrusted by the defendant with the duty of seeing that said track was in proper condition, the name of said person being unknown to the plaintiff." (8.) "And plaintiff avers that his injuries were caused by the negligence of one ——— Gould, whose given name is unknown to plaintiff, and who was an engineer, and who then and there had charge of the locomotive which was pulling the train of cars upon which plaintiff was engaged as brakeman, and said negligence consisted in this, the said engineer so negligently and carelessly managed his engine as to throw some of the cars which were being drawn by said engine from the track, whereby the plaintiff was thrown from the top of a car and injured and damaged as aforesaid." Defendant demurred to the 5th count on the grounds that "1st. No facts are alleged showing that said alleged rate of speed was negligent, reckless or dangerous. 2d, The rate of speed is not alleged; 3d, It is not shown or alleged how or in what way or by reason of what facts or circumstances said rate of speed was negligent, dangerous or reckless." Defendant

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demurred to the 6th count on the grounds that: 1st. "It is not shown thereby whether said alleged defect was due to the negligence of defendant or to the negligence of some particular employe of defendant; 2d, It is not shown thereby what was the official position of said person entrusted by defendant with the duty of seeing that its track was in proper condition." Defendant demurred to the 8th count for the same reasons as are assigned to the 5th count, and, also, upon the following grounds: 4th. "The facts constituting said alleged negligence are not stated with sufficient particularity; 5th, It is not shown in what respect or in what way said engineer was negligent. 6th. It is not shown that said engineer's name could not be ascertained by plaintiff by use of reasonable diligence." The court overruled each of the foregoing demurrers, to which ruling the defendant excepted and assigns same as error. Issue was joined on pleas of general issue and contributory negligence, in short by consent. The testimony for the plaintiff showed that the train was running, at the time of the accident, from fifteen to twenty miles per hour, that the grade was very steep, and that in the condition of the track, eight to ten miles per hour would be a safe rate of speed. The section foreman, a section hand, a brakeman on the wrecked train and the plaintiff testified that the rails were badly worn, that the ties were rotten and that the track needed ballasting. The section foreman testified that he had noticed the bad condition of the track several months before; that he endeavored to repair same with such material as was at his disposal but that there was not sufficient material to repair same properly. The plaintiff asked this witness whether he would consider, from his experience as a railroad man, that the track was a safe one, to which witness replied that he would not call it a safe track. To this question and the answer thereto, defendant objected on the ground that it was merely the conclusion of the witness. The court overruled these objections and defendant excepted. Plaintiff's counsel asked plaintiff "whether or not the rate of speed of 18 or 20 miles an hour at that point, with the train loaded as it was, was a dangerous rate of speed for the train to make," to

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which plaintiff replied that the train was going at a dangerous rate of speed. He was also asked by counsel, "Would fifteen miles an hour or twelve miles an hour have been a dangerous rate of speed at that time and place, loaded as the cars were," to which plaintiff replied that it would. To these questions and the answers thereto defendant objected. The court overruled the objections to which defendant excepted. The testimony for the defendant tended to show that the track was in fairly good condition and the speed of train, eight to ten miles an hour.

The defendant requested the affirmative charge as to the whole complaint and each count thereof, and also the following special charges: (21.) "If the jury believe from the evidence that the defects or defective condition of the track, if any existed at the time plaintiff became a brakeman for defendant, it was his duty to inform himself of them, and if he failed to do he assumed the risks thereof." (26.) "If you believe from the evidence that plaintiff is entitled to recover, you cannot award any damages on account of mental or physical suffering he has sustained since the injury." The court refused to give above charges, to which defendant separately excepted.

There were verdict and judgment for plaintiff, assessing his damages at \$1,999. Defendant filed a motion for a new trial, on the grounds that the verdict was excessive, the amount of same was not justified by the evidence as to the damages sustained; that it was not shown that plaintiff's injury was permanent; because, under the allegations of the complaint, plaintiff was not entitled to recover damages for mental and physical pain and suffering after the day of the injury and up to the time of the trial; because the verdict was contrary to great weight of the evidence in this: that the weight of the evidence did not show that the injury was caused by the defective condition of the track or by the negligence of the engineer. Said motion was denied and defendant duly excepted.

From above judgment, defendant appeals and assigns as error the various rulings of the trial court upon the

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pleadings and evidence, upon the charges requested by the defendant, and the overruling of defendant's motion for a new trial.

HUMES, SHEFFEY & SPEAKE, for appellant.—A rate of speed is dangerous or not, according to the circumstances. No rate of speed is *per se* negligence. Sistrunk's case, 85 Ala. 352-358. The allegation that it was reckless and dangerous is a statement of but the mere conclusion of the pleader.—*L. & N. R. R. Co. v. Teguor*, 125 Ala. 593; *McGhee v. Reynolds*, 117 Ala. 413. In suits by employes the burden is on the employe to bring himself within the terms of the statute by his pleading and proof; as he could not recover without proving the official position of the person who failed to remedy or discover the defect, he should be required to allege it, or to show his inability to find it out. 114 Ala., 191; 100 Ala., 187; 110 Ala., 185. A count not giving the given name of an alleged negligent engineer, should state that he had made an effort to find it out, and had been unable to do so by the exercise of reasonable diligence. *So. Ry. Co. v. Cunningham*, 112 Ala. 496. Evidence by an engineer and brakeman that a track is unsafe and dangerous, and as to the speed being dangerous, is but the conclusion of the witnesses. *Boland v. L. & N. R. R. Co.* 106 Ala. 641; *L. & N. R. R. Co. v. Teguor*, *supra*.

Not only was there no evidence that the alleged defect in the track caused the wreck, but there was positive evidence that it did not. *Davis v. Miller*, 109 Ala. 589. Where the evidence leaves the cause of the injury unproved, it cannot be attributed to defendant's negligence. *Saur v. Union Oil Co.*, 9 So. Rep. 566, *Tanney's case*, 129 Ala. 523.

There is no proof that the rails were "insecurely fastened to the cross ties." This was descriptive matter and burden was on plaintiff to prove it.—*L. & N. R. R. Co. v. Coulton*, 86 Ala. 129; *M. & O. v. George*, 94 Ala. 199, 219; *Armstrong's case*, 123 Ala. 233; 94 Ala. 413-418.

In case at bar, there was no evidence that engineer knew of the bad condition of the track, unless it was an obvious defect, with knowledge of which he was chargeable. If this, plaintiff was also so chargeable and assumed

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the risk of it or was guilty of contributory negligence in continuing in the service in its face. If an employe voluntarily undertakes to do work, the danger of which is obvious, he assumes the risk thereof.—*So. Ry. v. Guyton*, 122 Ala. 231; *Worthington v. Goforth*, 124 Ala. 656. Employe must use reasonable care to observe dangers. If the defect is obvious, knowledge thereof will be presumed.—*Sloss I. & S. Co. v. Knowles*, 129 Ala. 410.

Damages were excessive. The broken bones were reset, the injury could not be said to be permanent; he had no medical expenses. Was not entitled to recover punitive damages.—*Richardson v. Cotton Mfg. Co.* 116 Ala. 381; *B. R. & E. Co. v. Ward*, 124 Ala. 409. Verdict was contrary to evidence. Cause of wreck shrouded in uncertainty. *Tinney's case*, 129 Ala. 523.

A. H. CARMICHAEL, *contra*.—Averments in pleading required by Code, in this cause, are but little more than conclusions of pleader, leaving the facts to be brought out in the evidence.—*Ga. Pac. Rwy. Co. v. Davis*, 92 Ala. 300; *L. & N. v. Hawkins*, 92 Ala. 241; *K. C. M. & B. R. R. Co. v. Burton*, 97 Ala. 240. Citing as to negligence; *L. & N. v. York*, 128 Ala. 305; *Laughran v. Brewer*, 113 Ala. 509; *L. & N. v. Hawkins*, 92 Ala. 241; *A. G. S. R. R. Co. v. Bailey*, 112 Ala. 167.

Witnesses having shown themselves to be expert in their trade, may give expert testimony. Proper that jury should have benefit of their evidence, to be taken in connection with the other evidence.—*A. G. S. R. R. Co. v. Hall*, 105 Ala. 599; *Buckalew v. Tenn. Co.* 112 Ala. 146; *Culver v. Ala. Mid. Ry.* 108 Ala. 330.

There was evidence to support all the counts. A train man has the right to assume that the road bed and all appliances are in a safe and suitable condition.—*Ga. Pac. Ry. Co. v. Davis*, 92 Ala. *K. C. M. & B. v. Webb*, 97 Ala. 157.

Plaintiff having made out his case, is entitled to recover physical and mental suffering.—*A. G. S. R. R. Co. v. Bailey*, *supra*. New trial should not be granted unless verdict is clearly wrong and unjust. Verdict was not excessive.—*K. C. M. & B. R. R. Co. v. Lackey*, 114 Ala. 112.

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MCCLELLAN, C. J.—We read the fifth count to aver that the train of cars upon which plaintiff was in discharge of his duties as a brakeman was derailed, and plaintiff thereby injured, in consequence of its being run by the engineer in charge at a rate of speed which was reckless, that is, negligent and unregardful of consequences, and dangerous. This is a sufficient averment of negligence under the decisions of this court. It is much the same as an averment that the engineer so negligently run his engine as to cause the derailment and injury to plaintiff.—*Louisville & Nashville Railroad Company v. York Admr.*, 128 Ala. 305, 309.

The averment of the 6th count that the defect in defendant's track which caused the injury "arose from or had not been discovered or remedied owing to the defendant's negligence, or the negligence of some person in the service of the defendant and entrusted by the defendant with the duty of seeing that said track was in proper condition," etc., is a necessary averment under the statute, is well made substantially in the language of the statute, and is sufficient, as has been expressly held, without averring the name of the person so entrusted. Whether the defect arose from defendant's personal negligence or of a person "entrusted" in that behalf, and if the latter, his name, are facts best known, in the nature of things, to the defendant; and the averment as here made is not only sufficient, in all cases, but in many it is the only averment that can be made.—*Columbus & Western Ry. Co. v. Bradford*, 86 Ala. 574, 579, 580; *Woodward Iron Co. v. Herndon, Admr.*, 114 Ala. 191, 215.

The 8th count was not open to the objections taken by the demurrer. It sufficiently charges damnifying negligence on the part of the defendant's engineer in the management of his engine, (*Railroad Co. v. York, supra*),—and it in effect avers the surname of the engineer and that his christian name is unknown to plaintiff. It was not necessary for plaintiff to aver that he had made diligent effort to ascertain the engineer's full name but had failed to ascertain it.

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The witness Stewart was shown to be skilled and experienced in respect of track construction and track conditions. He was competent to give the opinions elicited from him to the effect that the track at the point of the derailment was in a defective and unsafe condition.

So with the witness Shea in respect of the speed of the train at the moment of derailment: He had long experience as a brakeman. His duties had to do with the regulation of the speed of the train under the varying circumstances of curve, grade and the like incident to a line of railway. He knew what was understood to be a safe rate of speed down the grade and around the curve at the point of this derailment. His experience especially qualified him to judge the speed of this train at that point. He was entitled as an expert to give his opinion on each of these matters, and to further state it as his opinion that the train, at the time and place in question, was running at a dangerously high speed, or, in other words, that the rate which he said it was going, about twenty miles an hour, was a dangerous rate of speed.

Each count of the complaint was supported by tendencies of the evidence, which made a case under each for the determination of the jury; and these tendencies were sufficiently strong in support of one or more of the counts as to render it impossible for us to affirm that the circuit court erred in overruling defendant's motion for a new trial in so far as that motion was rested on the ground that the verdict was contrary to or not sustained by the evidence. Nor can we affirm that the court erred in its conclusion that the verdict was not excessive in amount. Hence, our conclusion that the court properly refused to give the affirmative charge requested by the defendant upon the whole case and upon each count, and that the court did not err in overruling the motion for a new trial.

The case made by the evidence under the 6th count is essentially different from that of *Davis v. Miller*, 109 Ala. 589. There the overwhelming weight of evidence showed that the cause of the derailment was the presence of Miller's body under the cars, and not any defect in the

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track. Indeed, the evidence greatly preponderated to show that there was no defect. Here there is abundant evidence of a flagrantly defective condition of the track at the point of the derailment. But it is said that the evidence shows that these defects did not cause the derailment, for that it appeared beyond dispute that a wheel of one of the cars mounted a rail short of the point where the cars left the track and smashed it all to pieces, and that the defects shown in the evidence—rotten cross ties all along there, old, worn and inadequate rails, etc., etc.,—could not have possibly caused the wheel to mount the rail, but tended only to cause the rails to spread away from each other, the effect of which would have been obviously to let the wheels down on the ties between the rails, etc., etc. The fault of this position lies in its assumption that the mounting of a rail by a wheel of one of the cars was the beginning of the trouble and the cause of the derailment. This does not necessarily follow at all. *Non constat*, but this was itself caused by the derailment of cars in front of this one, or front wheels of this car. There was ample reason on the evidence for the jury to so find, to conclude that other cars in front of this, or wheels in front of this, left the track in consequence of its defective condition, and caused this wheel to mount the rail—that, in other words, this mounting of the rail was a consequence and not the cause of the derailment. Indeed that is the most reasonable conclusion open to the jury on the evidence. The fact that other trains passed safely over this track a short time before this occurrence did not preclude such finding by the jury: It may well be that these very preceding trains so aggravated the defective condition of the track as to render it incapable of bearing the weight and motion of the cars which were thrown off. Nor does the fact that the engine of this train, heavier than the cars, passed safely on this occasion demonstrate that the cars were not derailed in consequence of a defective track. It may well be that cars in a train, especially on a defective track, running down a steep grade around a curve, would have imparted to them a swaying, lateral, jerky motion more likely to spread a track or break light rails

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attached to insecure—rotten—ties than would be the more regular and direct motion of the heavier engine.

One averment of the 6th count descriptive of the alleged defective condition of the track is that the rails were “insecurely fastened to the cross ties.” It is insisted for appellant that there is no proof of this averment. We cannot concur in this view. The evidence was overwhelming that the ties were *rotten*. The jurors’ common knowledge was sufficient to afford them necessary assurance that rotten wood will not hold a rail or spike, and to justify their finding that the rails were not securely spiked to this rotten wood.

There was evidence by the engineer himself that the proper speed coming down this grade and around this curve was eight or ten miles an hour. There was other evidence that he brought his train down there on this occasion at a speed of from fifteen to twenty miles an hour, and that this was an improper and dangerous speed. This was clearly sufficient to justify a finding on the part of the jury that he was guilty of negligence in the management and running of his engine.

On the question of plaintiff’s alleged contributory negligence, the utmost that can be said is that there was some evidence tending to show that he was not duly diligent in putting on the brakes of which he had charge as the train ran down this grade, leaving it an issue for the jury under the 5th and 8th counts whether he was negligent in that respect, and, if so, whether such negligence contributed to this injury.

Trainmen do not assume the risks of defective track conditions. They have a right to assume that the track is safe. It is not their duty but the duty of other employes to keep it in proper condition. The acquaintance which trainmen are required to have with the premises, and to acquire which they are carried over the road on trains before being put in charge of trains, is more an acquaintance with the line, so to say, than with the *track*. They must know, and, in the way indicated, they are taught the conditions of the line in the respect of stations, stopping places, switches, sidings, grades, curves and distances. With these things they have to do; but

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not with the track itself in respect of its condition and maintenance. This plaintiff, a brakeman, was not charged with knowledge of the defects in this track, but, to the contrary, had a right to assume without investigation that the track was in good and safe condition. Charge 21 was, therefore, properly refused.—*Ga. Pac. Ry. Co. v. Davis*, 92 Ala. 300, 308, 309; *K. C. M. & B. R. R. Co. v. Webb*, 97 Ala. 157.

Charge 26 was also properly refused. We follow the example of appellant's counsel in pretermittting discussion of it.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Action of Assumpsit.

1. *Pleading and practice; joint cause of action; discontinuance.*

In an action of assumpsit against several defendants, where the complaint counts upon a joint cause of action against all of the defendants, and the record shows that each of the several defendants was served with process, the amendment of the complaint before the introduction of the evidence, by striking out one of the defendants, constitutes a discontinuance of the action against the remaining defendants.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WILLIAM S. ANDERSON.

This was a suit brought by the Evans Marble Company against G. J. McDonald & Company, Daniel J. McDonald, W. W. Kearn, Jackson C. Miles, and the D. J. McDonald Stone Company, a corporation. Each of these defendants was served with process. Upon the case coming on to be heard, the plaintiff amended its complaint by striking out the name of the D. J. McDonald Stone Company as a party defendant. This action was taken before the introduction of any testimony showing

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any personal defense to the D. J. McDonald Stone Company; immediately thereupon, the defendants moved the court for a discontinuance of the cause, on account of the voluntary discontinuance by the plaintiff as to the D. J. McDonald Stone Company. The court at first refused this motion, but subsequently reconsidered the matter, and entered a discontinuance in accordance with the motion. Subsequently the plaintiff made a motion for a new trial. The ground for the motion of a new trial was, that the discontinuance ought not to have been granted, because the court at first refused to order the discontinuance, and thereby permitted the plaintiff to introduce his testimony; and that by proceeding with the trial when the court compelled them to do so, the defendants waived their right to a discontinuance.

This motion for a new trial was overruled. The plaintiff appeals and assigns as error the order of the court granting the motion for a discontinuance and the judgment of the court refusing a new trial.

ROACH & McMILLAN, for appellants.—It is without question that complaint can be amended by striking out a party defendant.—Code of 1896, § 3331. This statute changes the common law rule of discontinuances in this regard.—*Curtis v. Gaines*, 46 Ala. 455. When there is something in fact to amend, an amendment is always allowable.—*Bacchus v. Mickle*, 45 Ala. 445. Where a suit is brought on joint, on joint and several contract, and one of the defendants was improperly joined with others because contract was entered into by those others but not by him, plaintiff can amend by striking that defendant out and burden of proving that there was no misjoinders as originally filed is on the defendant. *Masterson v. Gibson*, 56 Ala. 56. In the present case, there was clearly a misjoinder of parties, and this fact was in evidence at the time the motion for discontinuance was allowed, and although there may originally have been an error in refusing the said motion, it was error without injury, as was subsequently shown.

A discontinuance may be waived by the defendant by any subsequent pleading or prosecution of the defense.

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In this instance the defendants, after their motion for a discontinuance was overruled, joined issue on the complaint, a jury was selected and a trial proceeded with, the defendant cross-examining plaintiff's witnesses, and actively resisting plaintiff's claim throughout the first day of trial. Plaintiffs insist that this was a waiver of the discontinuance by the defendants.—*Torrey v. Forbes*, 94 Ala. 140; *Felkel v. Hicks & Co.*, 32 Ala. 25; *Gager v. Gordon*, 29 Ala. 341; *Bryan v. Wilson*, 27 Ala. 203; *Nelson v. Goree's Admr.*, 34 Ala. 578.

The amendment did not *ipso facto* operate a discontinuance of the action. The parties were all in court, and the defendant made no objection to the amendment, and the motion for discontinuance will not take the place of the objection. If it did *ipso facto* operate a discontinuance, Supreme Court would not reverse and remand. *Independent Pub. Co. v. American Press Ass'n.*, 102 Ala. 481; *Nelson v. Goree's Admr.*, 34 Ala. 578; *Stewart v. Goode*, 29 Ala. 476; *Mock v. Walker*, 42 Ala. 669.

GREGORY L. & H. T. SMITH, *contra*.—In this appeal there is involved the plain, simple question as to whether an amendment striking out one of the parties, without the introduction of any testimony showing the necessity of such action, by reason of some personal defense applicable to that defendant, and inapplicable to the others, will operate as a discontinuance of the entire cause. This question has been so often and so plainly decided that it is unnecessary to do more than to cite the authorities.—*Jones v. Engelhardt*, 78 Ala. 506; *Reynolds v. Simpkins*, 67 Ala. 378; *Kendall v. Lassiter*, 68 Ala. 181.

The defendants did not waive the discontinuance by proceeding with the trial after the court had refused their motion for a discontinuance.—*Cauldfield v. Flanagan*, 114 Ala. 48.

TYSON, J.—The complaint counts upon a joint cause of action against all the defendants named in it. The record shows that each of the several defendants was served with process.

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Plaintiff, without sufficient reason therefor, amended its complaint by striking out one of the defendants. Thereupon the other defendants moved the court to enter a discontinuance of the entire action. The court erroneously refused the motion.—*Jones v. Englehardt*, 78 Ala. 506, and cases cited.

However, on a subsequent day of the term, after plaintiff had introduced evidence tending to show an improper joinder of the defendant discharged by the amendment, and a liability on the part of those who had claimed the discontinuance, the court, acting upon another motion made by them discontinued the action.

While it is true the statute of amendments authorizes the striking out of a party defendant who has been served with process, (§ 3331 of Code) it has been uniformly held that this can only be done, in cases of this character, after a misjoinder has been shown.—*Bachus v. Mickle*, 45 Ala. 445; *Mock v. Walker*, 42 Ala. 668, 670; *Masterson v. Gibson*, 56 Ala. 56; *Reynolds v. Simpkins*, 67 Ala. 378.

The effect of the amendment was to discontinue the case—to put an end to it. The parties were, thereby out of court.—*Curtis v. Gaines*, 46 Ala. 455, 459. This being true, unless the discontinuance was waived by defendants, the court was without jurisdiction to proceed with a hearing of the cause. We do not find that there was a waiver. On the contrary, the record shows affirmatively that defendants persistently insisted upon their right to have the court enter an order showing the discontinuance.

Affirmed.

MCCLELLAN, C.J., HARALSON and DOWDELL, J.J., concurring.

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A. G. S. R. R. Co. v. Vail.*Action to recover Damages for Personal Injuries.*

1. *Liability of employer for acts of employe, below grade of general manager; when employe stands in place of employer.*—The rule in Alabama as to the common law liability of the employer for the acts of his employe is that the employer is liable for the performance of those personal, non-delegable duties, which the law holds the employer must attend to himself, and any servant charged with these duties stands in the place of the master.
2. *Non-delegable duties; sufficiency of force employed to perform task.*—One of the absolute non-delegable duties of the employer is that of seeing that the number of persons employed is sufficient to prevent each of them from being exposed to that class of risks which result from an inadequacy of the force available for the work in hand.
3. *Same; same; case at bar.*—Where an employe has been delegated by the master with the duty of hiring and discharging servants to perform a particular piece of work, over which said employe is foreman, he is the representative of the master in that matter, and is under obligation to employ sufficient number of servants to do the work.
4. *Direct and immediate cause of injury; if such exists, injury cannot be traced to remote cause.*—If an injury has resulted in consequence of a certain wrongful act or omission but, only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuses to trace it to that which was more remote.

APPEAL from the City Court of Birmingham.

Tried before the Hon. CHAS. A. SENN.

This action was brought by the appellee, Squire Thomas Vail, against the appellant, the Alabama Great Southern Railroad Company, to recover damages for personal injuries sustained by plaintiff who was an employe of the defendant corporation. The main facts in

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the case are set out in the opinion. Demurrers by the defendant were sustained to all of the counts of the complaint except the first, which was as follows: 1. "The plaintiff claims of the defendant the sum of five thousand dollars as damages for that heretofore on, to-wit: the 26th day of December, 1901, plaintiff was a servant of the defendant in the city of Birmingham, Alabama, and in the course of his employment as such servant, it became and was his duty to assist in unloading long, heavy timber from a certain car then at or near the defendant's round house in said city, and plaintiff avers that defendant negligently failed to provide a sufficient number of men to unload said timbers with reasonable safety, and that by reason of said failure, one of said timbers fell upon plaintiff's feet and mashed, bruised and wounded them so that he suffered great physical pain and mental anguish and his feet were permanently injured, and he was put to great expense for surgical and medical attendance, and medicines in and about attempting to cure said wounds, all to his damage in the sum aforesaid, therefore he sues." The defendant demurred to this count on the following grounds: 1. "For the said count states no cause of action against this defendant, in that it fails to allege that it was the duty of the defendant to provide any more men than it did provide for the unloading of said car. 2. For that said count fails to allege or show what number of men defendant furnished for the purpose of unloading said car, and what number of men it was necessary to furnish to enable the plaintiff to unload said car without being injured." The court overruled this demurrer and the defendant excepted. Issue was joined on the plea of general issue and contributory negligence. On the examination of plaintiff, as a witness, he was asked by his counsel whether Mr. Miller, the foreman, at any time, in the hearing of plaintiff, said anything to James Green, one of the workmen, about the way in which he (Green) attended to his work. The defendant objected to this question. The court overruled the objection and the defendant excepted. The plaintiff's counsel then asked witness what Mr. Miller said. The court overruled the objection of the defendant to this

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question and defendant excepted. Witness answered that Mr. Miller told Green "if he did not get a move on him, he would have to lay him off." The defendant excepted to the action of the court in overruling the motion of defendant to rule out this answer of plaintiff. These rulings constitute the basis of the 2d, 3d and 4th assignments of error. The plaintiff excepted to the ruling of the court in refusing to give the general charge for defendant, and special charge No. 7 set out in the opinion. There was verdict and judgment for plaintiff, assessing his damages at two hundred dollars. From this judgment the defendant appeals, and assigns the rulings of the trial court on the pleadings and evidence, set out above, as error.

A. G. and E. D. SMITH, for appellant.—This is a common law action and if the accident was due to the negligence of Robert Miller, who was a fellow servant, the general affirmative charge should have been given for the defendant.—*M. & M. Ry. Co. v. Smith*, 5 Ala. 245; *R. R. Co. v. Thomas*, 42 Ala. 721; *Smoot v. R. R. Co.*, 67 Ala. 13; *Bull v. R. R. Co.*, 67 Ala. 206; *A. G. S. R. R. Co. v. Carroll*, 97 Ala. 126; *R. R. Co. v. Mealer*, 1 C. C. A. 63; *Price v. R. R. Co.*, 145 U. S. 651; *R. R. Co. v. Waters*, 16 C. C. A. 609; *R. R. Co. v. Conroy*, 7 Am. Neg. Rep. 182; *Woodward Iron Co. v. Cook*, 124 Ala. 349.

Charge 7 should have been given.—Authorities cited above; *Western Ry. of Ala. v. Mutch*, 97 Ala. 194; *Stanton v. R. R. Co.*, 91 Ala. 382; *L. & N. R. R. Co. v. Kelsey*, 89 Ala. 287; *Thompson v. L. & N. R. R. Co.*, 91 Ala. 500; *L. & N. R. R. Co. v. Quick*, 125 Ala. 553.

The court should have sustained the demurrer to the first count of the complaint.—*Phoen. Ins. Co. v. Moog*, 78 Ala. 284, (special reference being had to par. 4 of opinion, p. 301); *City Council of Montgomery v. Gilmer*, 33 Ala. 116; *H. A. & B. R. R. Co. v. Dusenberry*, 94 Ala. 418.

The court should not have allowed the question propounded by appellee, and should have ruled out his answers thereto, to which questions and answers defendant objected.

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NATHAN L. MILLER, *contra*.

SIMPSON, J.—This was a suit by appellee against appellant, for damages from a personal injury received by appellee, while engaged as an employe of appellant, in unloading heavy timbers from a car.

All of the counts of the complaint, except the first, (which is set out in the statement of the case) were eliminated. Demurrers were filed to this count which were overruled, and issue was then joined on pleas of the general issue, and contributory negligence. The complaint is clearly based on the common law liability of the master, and not upon the statute.

The evidence shows that Robert Miller was the foreman, having 35 or 40 men under him, that he hired and discharged men. That he ordered the men to get in the car and unload, that he left them about an hour before the accident, leaving the three men, plaintiff, Peach and Green on the car, and three on the ground, all engaged in unloading the car.

The plaintiff states that there were eight men engaged in unloading the car first and that Miller took five of them away leaving only three unloading, but he immediately qualified that by stating that three were on the car and three on the ground, all assisting in unloading the car. Plaintiff states that they had handled two large pieces of timber, and when they were unloading the third large one, Green had the crow-bar resting on the top of the side of the car, and while it was in that position, the bar on which the timber was resting slipped out, and the timber fell on plaintiff's feet. That while Miller was there, Green did not appear to give proper attention to his work; that he did not seem to care whether he worked or not. He states that Green could have held the bar horizontally or, at a slight angle above horizontal, and in that way would have kept it from slipping. He also states that, when they had eight men, they could just raise the timber up and throw it out by main strength, but that three men could not throw it out that way, but had to lift one end at a time and place it on the skids, and have one to hold that end with the crow-bar while the others moved the other end.

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It is claimed by plaintiff that Miller was the "vice-principal" in this case, and not the fellow-servant of the plaintiff, that he was negligent, and, therefore, the master was responsible.

The cases involving the question as to whether an employe is a vice-principal, so as to stand in the place of the master, and be his "*alter ego*," so that the master is responsible for his negligence, are divisible into two classes, to-wit: one in which the representative character is regarded as determinable by the rank which he holds in the master's service, and the other in which his rank is held to be immaterial, and the master is held to be responsible according as the employe was or not deputed to perform those strictly personal duties of the master, variously denominated "absolute," "non-delegable," "non-assignable," or "non-transferrible."—1 Labatt on Master & Servant, § 150, p. 313.

From an early period in England one current of authorities held that a master who transferred all of his business to a general manager, constituted such general manager his "*alter ego*" and was responsible for his acts of negligence, to his servants. But that doctrine was finally repudiated, and the English cases now, following the leading case of *Wilson v. Merry*, L. R. 1st H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, hold that the rule that the servant assumes all the risks arising from the negligence of other servants is not subject to any exceptions, the reasoning being that the master cannot be held liable unless he himself has been negligent, that he has not agreed to do the work personally, and, at all events, the servant can choose whether he will serve the master who does all of his own work, or the one who employs others to attend to it.—2 Labatt on Master and Servant, §§525, 529, pp. 1484, 1501 and notes.

But in the United States the great weight of authority favors a more liberal policy towards the employe, and it may be stated as the well established rule in American courts that a general manager, having entire charge of the business of the master, is his "*alter ego*," and the master is responsible, to other employes, for his acts. *Honner v. Ill. C. R. Co.*, 15 Ill. 550; *Washburn v. N. &*

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C. R. R., 3 Head, 638, 75 Am. Dec. 784; *Lund v. Hersey Lumber Co.*, (C. C.) 41 Fed. 202; *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521; *Brickner v. N. Y. C. R. R.*, 49 N. Y. 672; 2 Labatt on Master and Servant, §§ 527, 530 and notes.

When we get below the position of general manager, there is considerable conflict in the authorities, some not extending the liability below the general manager, others adopting the superior servant idea, and holding the master responsible for the acts of any servant who holds a position superior to that held by the servant injured, and others holding that it is not a question of the relative grade in the service, but depends entirely on the question as to whether the employe, whose negligence is complained of, is discharging one of those personal, non-delegable duties, which the master must attend to himself, so that any servant charged with these duties stands in the place of the master. This latter is the principle adopted by the Supreme Court of Alabama.—*Walker v. Belling*, 22 Ala. 294, 309, 310; *Mobile & O. R. R. v. Thomas*, 42 Ala. 672, 713, 727; *Mobile & Montgomery Ry. v. Smith*, 59 Ala. 245, 250-251; *Tyson v. S. & N. Ala. R. R.*, 61 Ala. 554, 557-558; 32 Am. Rep. 8; *Postal Tel. Co. v. Hulsey*, 115 Ala. 193, 204; 22 South, 854; *Ga. Pac. Ry. v. Davis*, 92 Ala. 300, 312-313.

It is difficult to determine upon what principle the courts have undertaken to determine, without legislative aid, that certain duties are delegable, and others non-delegable, but, so far as the case now before the court is concerned, our own court has made some deliverances which throw light upon the question of liability *vel non*, under the facts detailed.

Our court has held that one of the absolute, non-delegable duties of the master is the duty of selecting competent employes to manage his business.—*Walker v. Belling*, *supra*; *Tyson v. S. & N. Ala. R. R.*, *supra*.

It has held also that the master does not guarantee the competency of his employes, but is only responsible for reasonable care in selecting them.—*Smoot v. Mobile & Montgomery R. R.*, 67 Ala. 13, 18, 20; *Clements v. A. G. S. Ry.*, 127 Ala. 166, 171, 172.

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It has held that neither a conductor, an engineer, nor a superintendent of work, is a vice-principal, so as to make the master responsible for his negligence.—*Ga. Pac. Ry. Co. v. Davis, supra*; *L. & N. R. R. Co. v. Allen's Admr.*, 78 Ala. 494, 502-503; *Woodward Iron Co. v. Cook*, 124 Ala. 349, 333, 354.

On the other hand, it has held that a yard master, who was invested with authority to appoint or remove engineers, was discharging a corporate function, and, consequently, if said yard-master selected an incompetent engineer, not having exercised ordinary care in ascertaining his qualifications, the master was liable for any injury which resulted from placing such incompetent man in charge of an engine.—*Tyson v. L. & N. R. R. Co., supra*.

And in a case where an engineer, in addition to his duties as engineer, was vested with the power to appoint and discharge employes, and an accident occurred, by the train, which said engineer was managing, running into a wash-out, the company was not liable, because he was, at that time discharging his duties as engineer, and the accident was attributable to his negligence in that capacity, and not to his negligence in the selection of employes.—*Mobile & Montgomery Ry. v. Smith, supra*.

The single count in the complaint, on which issue was joined claimed that the accident occurred by reason of the fact that "the defendant negligently failed to provide a sufficient number of men to unload said timbers, with reasonable safety."

The foreman, Robert Miller, testified that it was a part of his duties to hire and discharge the servants, under him.

It is declared, by high authority, in other states that one of the absolute (non-delegable) duties of the master, is that of "seeing that the number of persons employed is sufficient to prevent each of them from being exposed to that class of risks which results from an inadequacy of the force available for the work in hand."—2 Labatt on Master & Servant, § 573, p. 1679.

This duty is so near akin to that of selecting competent servants that we hold it to be within the principle here—
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tofore decided by this court, and that Miller, having been delegated by the master with the duty of hiring and discharging servants to perform the work, over which he was foreman, was the representative of the master in that matter and under obligation to employ servants sufficient to do this work. If he had to take some away to perform some other work, he should have employed others, if necessary, to perform this work properly.

There was evidence in the case, from which the jury may have found that the accident resulted from his not having employed a sufficient number of men for the work. Hence there was no error in the refusal of the court to give the general charge requested by the defendant.

The court erred in refusing to give charge No. 7 at the request of defendant. "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause, the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote."—*L. & N. R. R. Co. v. Quick*, 125 Ala. 553, 561, 572; *Stanton v. L. & N. R. R. Co.*, 91 Ala. 382, 386, 387; *L. & N. R. R. Co. v. Kelsey*, 89 Ala. 287, 289-290; *Western Ry. of Alabama v. Mutch*, 97 Ala. 194; *Thompson v. L. & N. R. R. Co.*, 91 Ala. 496, 500.

The demurrer to the first count in the complaint was properly overruled.—*Ga. Pac. Ry. v. Davis*, 92 Ala. 300, 307; *S. & N. R. R. Co. v. Thompson*, 62 Ala. 494, 500; *Laughran v. Brewer*, 113 Ala. 509, 515.

The court erred in overruling objections to testimony, as stated in the 2d, 3d and 4th assignments of error. The remarks of the foreman to the fellow servant were not relevant to the issue involved in the case.

For the errors stated the judgment of the court is reversed, and the cause remanded.

MCCLELLAN, C.J., TYSON and ANDERSON, J.J., concurring.

[Bland v. City of Mobile.]

Bland v. City of Mobile.*Action against Municipal Corporation for recovery of Damages for Personal Injuries.*1. *Charter of City of Mobile; presentation of claim before suit.*

In an action against a city to recover damages for alleged personal injuries, a statement giving the name and residence of plaintiff, the nature and elements of her injuries, when, where and how sustained, and the amount claimed, is a sufficient compliance, when properly filed, with the terms of the city's charter requiring that claims be presented to the city before suit; and the fact that the concluding clause of statement agrees to accept \$500 "By way of compromise or settlement in order to avoid litigation" does not destroy the effect of the claim as a statement.

2. *Same; same.*—In such an action, it is necessary that the complaint should aver the presentation of the claim sued on, and the evidence offered must correspond with the allegation of the complaint.3. *Same; same; amount claimed.*—The general rule that a plaintiff can recover less than he claims in his complaint, does not apply to suits against a city, where such city's charter requires that no claims against the city can be sued on until a statement of such claim has been filed with the city clerk for consideration of the city council; and a claim setting forth one amount as damages is not admissible in evidence to support the allegations of a complaint claiming a different amount as damages.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. ROBERT TAIT ERVIN, Special Judge.

This is an action brought by the appellant, Ellen Bland, against the appellee, the City of Mobile, to recover damages for personal injuries sustained on account of falling through a foot-bridge crossing a gutter in one of the public streets of the city of Mobile. Section 22 of the charter of the city of Mobile, 1901, reads as follows: "No claim against the city of Mobile, whether

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arising *ex contractu* or *ex delicto*, shall be sued on until a statement thereof, giving date of accrual, name and residence of original claimant and of assignee, if any; circumstances and amount claimed, shall have been filed with the city clerk for consideration of the general council and either rejected by them or held by them for sixty days without action." Plaintiff sued for one thousand dollars. The complaint contained the following averment: "And plaintiff avers that she filed her claim for damages in this case with the general council of the city of Mobile, more than sixty days before filing this suit; that said claim was prepared and filed in strict compliance with the ordinance of the city of Mobile, which requires the filing of claims of this character, and that said general council declined to settle with plaintiff and disallowed her claim." Issue was joined on the plea of the general issue. The defendant admitted that plaintiff's attorneys filed with the city clerk of Mobile and presented to the general council the following paper: "Ellen Bland, a highly respectable colored woman and a resident of this city, makes claim against the city of Mobile for the sum of five hundred dollars, under a statement of facts substantially as follows, to-wit: On Friday evening, the 17th of April, 1903, between 7 and 8 o'clock, claimant undertook to cross one of the city bridges, leading from the street to the sidewalk, at the southeast corner of Basil and Locust streets. The planks of the bridge were not nailed or secured to the sidewalk, so that when claimant undertook to walk across said bridge, one of the planks gave way and slipped, thereby throwing claimant into the gutter, or ditch, and doing her very serious injury—perhaps of a permanent character. Both of her ankles were severely sprained, she was badly bruised, and her back and one of her hips were so severely wrenched and sprained that she has ever since been confined to her home, and is likely to suffer for many days, if not months. Claimant's drug bill and doctor's bill will necessarily be large, she will be unable to perform her usual labor for a long time, and her suffering is very intense, but she is willing to accept the amount stated, as a compromise settlement, and in order

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to avoid litigation, if it shall please the council to act in this matter at once." Plaintiff offered to introduce said claim in evidence as a part of her case, to which defendant objected on the following grounds: "Because it does not comply with the requirements of section 22 of the charter of the city of Mobile; is irrelevant, immaterial and incompetent; is an offer of compromise and therefore incompetent evidence." The court sustained this objection, and to this ruling the plaintiff excepted.

The court gave the general affirmative charge for the defendant.

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the rulings of the trial court, to which exceptions were reserved.

McALPINE & ROBINSON, for appellant.—The claim presented is sufficient in every way. The purpose of the law is to require claimants to notify the city council of the claim and give them an opportunity to settle. Technical accuracy in framing the claim is not required.—*Newman v. Mayor & Aldermen of Birmingham*, 109 Ala. 633; *Barrrett v. City of Mobile*, 129 Ala. 184.

B. B. BOONE, *contra*.—Complaint must aver presentation according to statute, and must put before the court evidence in support of such averment. Amount named in claim was \$500; amount sued for was \$1,000. The purpose of the charter was to require the statement of a certain, fixed amount as damages, and not a sum as "a compromise settlement."—*Burton v. Dangerfield*, 37 S. C. 351; *Jackson v. Clopton*, 66 Ala. 29.

ANDERSON, J.—This action was brought by the plaintiff against the defendant to recover damages for personal injuries, sustained by falling into or through a bridge of the defendant.

The court below gave the general affirmative charge for the defendant, which was based upon the fact that plaintiff had not established a proper presentation or filing of a statement, as is required by § 22, p. 2363, Acts, 101.

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The appellant has two assignments of error, the giving of said affirmative charge and the ruling of the court in sustaining the defendant's objection to her statement or claim which was offered in evidence.

If the ruling of the court was proper in excluding this evidence, then the general charge should have been given for the defendant. Consequently, the sole enquiry in this case is, did the plaintiff comply with said section in the presentation or filing of her said claim? The section reads as follows: "Be it further enacted, That no claim against the city of Mobile, whether arising *ex contractu* or *ex delicto* shall be sued on until a statement thereof giving date of actual name and residence of the original claimant and of assignee, if any circumstances and amount claimed shall have been filed with the city clerk for the consideration of the general council and either rejected by them or held by them for sixty days without action."

The plaintiff offered in evidence a statement, which gives name and residence of the plaintiff, the nature and elements of her injuries, when, where and how sustained, and the amount claimed, \$500.00. It did conclude, by agreeing to accept \$500.00, "by way of compromise or settlement in order to avoid litigation." We cannot see how the concluding clause above quoted could destroy the effect of the claim as a statement. It was specific enough to notify defendant that the damage claimed was \$500.00 and that the claim could be adjusted for that sum.

This court held in *Newman v. Mayor of Birmingham*, 109 Ala. 630, in passing upon a differently worded section, but one that was enacted for the same purpose: "The purpose of the statute requiring the presentation, was to give the board opportunity to investigate and adjust claims preferred against the city, without the expense of litigation."

We think the statement filed was amply sufficient to give the defendant notice of the claim and that it could be settled for \$500.00, and contained also, every statutory recital.

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Defendant admitted in open court presentation and refusal of the statement offered, which relieved plaintiff of making preliminary proof of filing, etc. The statute, however, requires the filing of the claim as a condition to the prosecution of the suit, and it is therefore necessary that the complaint should aver the proper presentation of the claim sued on. The complaint in this case avers the filing of the claim sued on and the evidence offered did not correspond with the allegation of the complaint, and the objection to the claim offered was properly sustained.

We are aware of the rule that generally a plaintiff can recover less than he claims in his complaint, but do not think the rule embraces cases where the filing of the claim is required, setting out amount, etc., is essential to a recovery. or to file one claim and sue on another, and then introduce in evidence the one filed, which shows upon its face that it does not correspond with the allegation of the complaint. The judgment of the circuit court is affirmed.

Affirmed.

McCLELLAN, C.J., TYSON and SIMPSON, J.J., concurring.

Southern Railway Co. v. Parnell.

Action against Railroad Company for killing Dog.

1. *Action against railroad company for killing dog; evidence as to what plaintiff was offered for dog inadmissible.*—In an action against a railroad company to recover damages for the alleged killing of a dog, it is error for the court to allow the plaintiff to testify that a year or two before the dog was killed, he was offered \$100.00 for it.

[Southern Railway Co. v. Parnell.]

APPEAL from the Circuit Court of Washington.

Tried before the Hon. WILLIAM S. ANDERSON.

This action was brought by the appellee, John W. Parnell, against the Southern Railway Company to recover \$100.00 damages for the alleged killing of plaintiff's dog.

There was evidence introduced showing that plaintiff's dog was killed by one of the defendant's trains. During the examination of the plaintiff as a witness, and after he had testified that the value of the dog killed by the defendant's train was \$100.00, it was allowed, against the objection and exception of the defendant, to further testify, "that one Bill Tate had offered him \$100.00 for dog in question about a year or two before he was killed." It is unnecessary to set out the other facts of the case. There were verdict and judgment for the plaintiff assessing his damages at \$25.00.

The defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

KIMBROUGH & WILSON, and BESTOR & GRAY, for appellant. Appellee should not have been allowed to testify that Bill Tate offered him \$100 for the dog a year or two before he was killed. (Record page 15.)—*Torrey v. Burrey*, 113 Ala. 496 (505); *Louisville Jeans Clothing Co. v. Lischkoff*, 109 Ala. 136 (141). Tate's offer amounted to no more than an estimate placed on the dog by him and without showing that he knew the dog, or anything about the value of dogs.—*Pharr & Peck v. Bachelor*, 3 Ala. 337 (347).

No counsel marked as appearing for appellee.

McCLELLAN, C. J.—The Circuit Court erred in receiving evidence to the effect that one Tate, two years before the dog was killed, had offered plaintiff one hundred dollars for it.—*Tennessee Coal, Iron & R. R. Co. v. State*, (Ala.), 37 South 433. We discover no other error in the record.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, J. J., concurring.

[Smith *et al.* v. Allen.]

Smith *et al.* v. Allen.

Action of Assumpsit.

1. *Jurisdiction of circuit and city courts; when judgment for less than limit of jurisdiction, suit should be dismissed.*—Where, in an action of assumpsit brought in the circuit or city court to recover \$100.00, the verdict and judgment are for \$13.50, and the amount claimed was not reduced by reason of a set-off successfully made by the defendant, said judgment, being below the minimum amount of the court's jurisdiction, should, upon motion made by defendant, be set aside and the suit dismissed, (Code, Sec. 3315.)

APPEAL from the City Court of Talladega.

Tried before the HON. G. K. MILLER.

The facts in this case are sufficiently stated in the opinion.

KNOX, DIXON & BURR, for appellants.—Section 3315 of the Code of Alabama provides that if a suit be brought for the jurisdictional amount, or above, and a less sum be recovered, unless the amount is reduced below that of which the Court has jurisdiction by a set-off successfully made by the defendant, the judgment must be set aside and the suit dismissed, unless the defendant, or someone for him, make affidavit, which must be filed in the cause, that the amount sued for is actually due, and that a recovery for the true amount was prevented by failure of proof, the interposition of the statute of limitations, or by some other sufficient cause, to be judged of by the Court; and in that event the defendant must have judgment for the reduced sum. In this case, as appears from the bill of exceptions and the record, there was no such affidavit filed and therefore the Court could do nothing but set aside the judgment and dismiss the suit in compliance with the mandatory terms of the statute.—*Mills v. Long*, 58 Ala. 438; *First National Bank of Gads-*

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den v. Pinson, 105 Ala. 548; *McClure v. Lay*, 30 Ala. 208.

No counsel marked as appearing for appellee.

McCLELLAN, C. J.—This is an action of assumpsit, instituted by Mrs Allen against M. L. Smith, et al., in the city court of Talladega for one hundred dollars. There was verdict and judgment for the plaintiff in the sum of thirteen and 50-100 dollars. Motion was made by defendants to set aside this judgment and dismiss the suit on the ground that the recovery was for a less amount than that of which the court had jurisdiction, under the provisions of section 3315 of the Code. The motion should have been granted: The action was “on a moneyed demand.” The recovery was below the minimum amount of the court’s jurisdiction. The amount claimed was not reduced “below that of which the court had jurisdiction by a set-off successfully made by the defendants.” Every constituent of the statutory predicate for the motion, therefore, existed. The affidavit provided for by the statute to avail the setting aside of the judgment and dismissal of the suit was not made. The court erred in overruling the motion. Its judgment thereon must be reversed and a judgment will be here entered granting said motion, setting aside the judgment for plaintiff and dismissing the suit out of the city court.

Reversed and rendered.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Lehnert v. Lewey *et al.*

Action Upon a Promissory Note.

1. *Promissory note; discharge of surety by extension of time to principal.*—An extension of the date of payment of a promissory note granted by the owner of the note to the principal and founded on a valuable consideration, discharges the surety, if made without his knowledge and consent; but a plea by a surety which sets up such discharge is subject to

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demurrer if it contains no averment that the agreement between the owner of the note and the principal debtor to extend the time of payment was supported by a valuable consideration.

APPEAL from the Circuit Court of Colbert.

Tried before the HON. ED. B. ALMON.

This action was brought by the appellant, George A. Lehnert against J. S. Lewey and Peter J. Karge, and counted upon a promissory note for \$50.00. The defendant Karge pleaded the general issue, payment and the following special pleas: 3d. That defendant Peter J. Karge was surety on the obligation sued on in this case and this fact was known to the plaintiff before said obligation was purchased and transferred to him. That before default in the payment of said obligation and before plaintiff became the owner of same defendant Karge stated to plaintiff that when said obligation matured, he, Karge, wanted it paid, and if defendant Lewey did not pay it, he Karge would pay it and indemnify himself from the property security mentioned in said obligation. That he would not be liable on said obligation any longer. That notwithstanding these facts all of which was known to plaintiff, he purchased said obligation and for a valuable consideration moving from the defendant Lewey, extending the payment of said obligation without the knowledge or consent of the defendant, Karge, wherefore he pleads his discharge from all liability on said obligation." "4th. For further answer to said complaint defendant Karge said, he signed the obligation sued on in this case as surety for the accommodation of defendant Lewey, and this fact was known to plaintiff before he purchased said obligation, and prior to the purchase of same by plaintiff, he was informed by defendant Karge that he wanted said obligation paid at maturity as he would not consent to remain liable on same any longer and if defendant Lewey did not pay it, he, Karge, would do so and indemnify himself out of the stock mentioned in said obligation as security therefor, which stock was in possession of said Lewey at the maturity of said obligation and liable for its payment and sufficient for its full satisfaction. That knowing these

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facts, plaintiff purchased said obligation under an agreement with the defendant Lewey to extend the payment of said obligation, and did extend the payment of same without the consent of the defendant Karge, and neglected and refused to sue defendant Lewey, or enforce the satisfaction of said obligation from the stock mentioned therein to the damage of defendant Karge in the sum of one hundred dollars, wherefore he says he is discharged from further liability on said obligation."

The plaintiff demurred to the 3d and 4th pleas upon the following ground: "Because said plea fails to show a valid and legal contract between the plaintiff and the defendant Lewey, extending the time of payment of the obligation or note sued on, supported by a legal and valid consideration without the consent of defendant Peter J. Karge, by which plaintiff was disabled from suing on the original contract or obligation during the period for which the time of payment was extended." The demurrers to the 3d and 4th pleas were overruled. Under the opinion on the present appeal it is unnecessary to set out in detail the facts of the case. There were verdict and judgment for the defendants. The plaintiffs appeal and assign as error the overruling of the plaintiff's demurrer to pleas 3 and 4.

ISAAC ORME, for appellant. Mere extension of time of payment to the principal, without any consideration therefor, does not release the surety.—*Howle v. Edwards*, 97 Ala. 649; 11 So. Rep. 748; *Cox v. Mobile & Girard R. R. Co.*, 37 Ala. 320.

WILHOYTE & NATHAN, *contra*.

TYSON, J.—Special plea numbered four (4) was subject to the demurrer interposed to it. It contains no averment that the agreement between plaintiff and Lewey to extend the time of payment was supported by a valuable consideration.—*M. & M. R. R. Co. v. Brewer*, 76 Ala. 135; *Scott v. Scruggs*, 95 Ala. 383; *Howle v. Edwards*, 97 Ala. 649.

It is wholly insufficient to invoke the defense afforded under section 3884 of the Code.

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The only objection urged against the sufficiency of plea three is that the agreement to extend the time of payment is not shown to have been for a valuable consideration. The plea expressly avers this fact. It is true it does not aver for what length of time the extension was given, but if this be a defect, it is not insisted upon.

Reversed and remanded.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

**Mobile, Jackson & Kansas City R. R.
Co. v. Louisville & Nashville
R. R. Co.**

Bill in Equity for an Injunction.

1. *Right of railroad company to enjoin another railroad company from laying its track along streets of city.*—A railroad which maintains a track along a street in an incorporated city, and owns lands abutting on said streets, can maintain a bill to enjoin another railroad company from constructing its track along said street, and from crossing its right-of-way and track along said street, said second railroad company not being authorized by law so to do.

APPEAL from the Chancery Court of Mobile.

Heard before the HON. THOMAS H. SMITH.

The bill in the case was filed by the appellee, seeking to restrain and enjoin the appellant from laying its track in the City of Mobile in front of the property of the appellee, or upon any part of the right of way of appellee, or from crossing any of the tracks of appellee on Water Street in the City of Mobile, and from laying the track of appellant across certain lots claimed to be owned by appellee in the City of Mobile.

At the hearing on the merits the Chancellor dissolved the injunction and an appeal was taken by the appellee

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to the Supreme Court where the cause was reversed and remanded, for the reason that the grant by the City of Mobile to appellant in this cause of the franchise to lay its tracks on Water street was void.

Upon the second hearing the chancellor rendered a decree from which this appeal is taken. The following is a copy of the last decree:

"This cause having been set down to be heard this day came appellant, by its solicitors of record, and said cause having been submitted upon the pleadings and testimony, as noted, and having been considered, it is ordered, adjudged and decreed that the complainant, the Louisville & Nashville Railroad Company, is entitled to the relief prayed for in its original bill of complaint, and that the defendant be perpetually restrained and enjoined from building the railroad track of the defendant, the Mobile, Jackson and Kansas City R. R. Company, upon any part of the right of way of the complainant, the Louisville & Nashville R. R. Company and from crossing any of the tracks of the complainant, the Louisville & Nashville R. R. Company, on Water street in the city of Mobile, and from building any part of the said defendant's tracks on Water street in the city of Mobile within a less distance than eight feet three inches between defendant's rail nearest to the track of the complainant and the rail of complainant's track, and from building any part of said defendant's track within a less distance than three feet between either of its rails and the sidewalk in front of the complainant's property abutting on the part of Water street which is between a point two hundred feet south of Eslava street and the south side of Theatre street; and the defendant, the said Mobile, Jackson & Kansas City R. R. Company, its officers, agents and employees, are hereby further restrained and enjoined from building the track of the said defendant, the Mobile, Jackson & Kansas City R. R. Company, across any part of lots fourteen and fifteen in square number two, or lots four and five in square number three, in the middle Division of the Bernoudy Tract. until said defendant has duly condemned the same by due process of law, and unless and until it shall have paid to com-

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plainant proper compensation for the use of said lots for defendant's said right of way."

From this decree the defendant appeals and assigns the rendition thereof as error.

McINTOSH & RICH, for appellant.—The decree of the Chancellor, cutting off the right of appellant to condemn a crossing over the tracks and right of way of other railroad companies, is in direct conflict with both the constitution and the special enactment cited above.

The right of one railroad to cross another with its tracks after making due compensation can not be questioned.—*Memphis & C. R. R. Co. v. B., S. & T. R. Co.*, 96 Ala. 571. "A railroad company may condemn private property on the line selected in a city before it has obtained the consent of the city to cross intervening streets."—*Lewis on Eminent Domain*, Sec. 395; *Chicago & W. Ind. R. R. Co. v. Dunbar*, 100 Ill. 110; *Gilbert v. Elevated R. R. Co.*, 70 N. Y. 361.

GREGORY L. SMITH and JOEL W. GOLDSBY, *contra*. This court held that the City of Mobile had no power to adopt the ordinance under which the defendant below sought to build its track; that the evidence established that complainant was an abutting property owner and that the building of the track would materially injure the street for general use as a street, and that complainant was entitled to enjoin the building thereof.—*L. & N. R. R. Co. v. M. J. & K. C. R. R. Co.*, 124 Ala. 162. Water street has already been appropriated to the use of the public as a street and is no longer private property; having already been appropriated to a public use it cannot be condemned to a different public use without legislative authority.—*Anniston & C. R. R. Co. v. J. G. & A. R. R. Co.*, 82 Ala. 292. And it has been held in this very case that the construction of appellant's track upon Water street would be unlawful and a public nuisance.—*L. & N. R. R. Co. v. M. J. & K. C. R. R. Co.*, 124 Ala. 162.

[Mobile, Jackson & Kansas City R. R. Co. v. Louisville & Nashville R. R. Co.]

SIMPSON, J.—The original bill, in this case was filed by the appellee, and sought to enjoin appellant from building its railroad track upon any part of the right of way of appellee and from crossing any of its tracks on Water street in Mobile, and from building said tracks on said Water street within a less distance than eight feet, three inches, from appellee's rail, and from building within a less distance than three feet from the sidewalk abutting on certain lots described as belonging to appellee, and also from building over said lots without condemnation and payment. A preliminary injunction was granted, but, on final hearing, the injunction was dissolved and the bill dismissed. The case having been brought, by appeal to this court, was reversed and remanded.—*L. & N. R. R. Co. v. M. J. & K. C. R. R. Co.* 124 Ala. 162.

The action of this court was based on the rights of appellee, as owner of lots abutting on the streets, to enjoin the erection of a nuisance on the street, it being held that the act incorporating the Port of Mobile, did not confer the authority to grant a franchise of its public streets for railway purposes, consequently that the ordinance attempting to grant said franchise was void and that a railway built on said streets without authority of law was a nuisance. It was consequently declared by this court that "the complainant was entitled to the injunctive relief sought," and the case was reversed and remanded.

The case having been resubmitted by the complainant, the defendant offering no additional evidence, the chancellor granted the relief sought by the original bill, and, in accordance with the former decision of this court.

While the decision of the court must be affirmed, yet, as its wording is liable to be misinterpreted, as suggested by counsel for appellant, we declare its meaning in those particulars to be that the injunction against building the tracks of appellant upon any part of the right of way of appellee, refers only to its right of way on Water street in the city of Mobile. Counsel for appellant object that in authorizing the injunction against appellants cross-

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ing the tracks of appellee on Water street, the appellant is deprived of the rights given by the Constitution and statutes of Alabama to condemn a crossing over any other railroad, but it must be remembered that the only crossing sought to be made by appellant, is a crossing which is incidental to its laying its tracks on and along Water street in Mobile, which this court has declared to be a nuisance and subject to injunction on the complaint of appellee. This court does not express any opinion as to the right of a railroad company to condemn a crossing where it has authority to build, as that question is not presented by the record.

Taking the view of the case which we do, it is unnecessary to refer specially and separately to the several assignments of error and objections urged thereto.

Let the judgment of the court be affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

Acree *et al.* v. Stone.

Bill in Equity to enforce Vendor's Lien.

1. *Bill to enforce vendor's lien; when lien not shown to have been waived.*—In a bill filed to enforce a vendor's lien, it was averred that certain specifically described lands were conveyed to the defendants upon the recited consideration "of love and affection and the sum of \$600 cash in hand paid;" that the lands were sold under an agreement of sale with the father of the grantees named in said deed and one of the grantees who was not a minor; that the grantees were nieces and nephews of the grantor; that the land so conveyed was worth \$2,000, and the grantor desired to make an advancement to the grantees therein to the extent of \$1400; and that the other part of the purchase money amounting to \$600 was to be paid to the grantor; that evidencing the \$600 notes were given by the father of the grantees and the one of the grantees who was not a minor. *Held:* that the vendor's lien to the extent of \$600 was not lost by reason of the fact of the taking

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of the note signed by the father of the grantees and the one of the grantees who was not a minor.

2. *Same; proper parties to such bill.*—In such a case the legal title to the lands conveyed by the grantor being in the grantees who were children of one of the makers of the note, such grantees were proper parties defendant to the bill.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the HON. RICHARD B. KELLY.

The bill in this case was filed by the appellee, W. C. Stone as administrator of W. H. Stone, deceased, against the appellants. The bill alleges among other things that the said W. H. Stone in his life time conveyed to the appellants, W. C. Acree, J. B. Acree, S. E. Ramsey, O. T. Acree, T. C. Acree, W. H. Acree and K. B. Acree, certain lands therein described, the deed being set out in the bill of complaint, and seeks to enforce an alleged vendor's lien against the appellant on said lands in favor of said administrator. The bill avers that the complainant's intestate valued said land at two thousand dollars, and that he estimated that the interest of appellants, all of whom, except W. J. T. Acree, are alleged to be the nephews and nieces of said W. H. Stone, would be about the sum of fourteen hundred dollars, and that that part of the purchase price of said land was treated and considered as an advancement to the grantees in said deed and as in settlement of the interests which the said parties would be entitled to in the estate of the said W. H. Stone at the time of his death, and that six hundred dollars was the amount and value of said land over and above what was considered by the said W. H. Stone would be the interest of the grantees in his estate; it is further alleged that the grantees are the children of W. J. T. Acree and that at the time of the execution of said deed were all under the age of twenty-one years except W. C. Acree, and that to secure the unpaid balance of six hundred dollars named as part of the consideration for said deed W. J. T. Acree and W. C. Acree gave their notes to the said W. H. Stone. The bill further avers that W. J. T. Acree is not a grantee in said deed and received no interest in said land by reason of the conveyance from the said W. H. Stone.

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The defendants demurred to the bill, assigning in various ways the ground that the vendor had waived his lien by taking independent security. The defendants also moved to dismiss the bill for the want of equity. On the submission of the cause upon the demurrers to the bill and the motion to dismiss the bill for the want of equity, the chancellor rendered a decree overruling the demurrers and said motion. From this decree the defendants appeal and assign the rendition thereof as error.

JAMES W. STROTHER, for appellant.—To maintain a bill to enforce a vendor's lien there must be a debt to the complainant contracted in the purchase of the land, for which the defendant became at some time bound to pay. *Scheerer v. Agee*, 106 Ala. 150; *Kelley v. Karsnar*, 81 Ala. 500; *Thomason v. Cooper*, 57 Ala. 560. The taking of independent security for the purchase money or the taking of personal security on the purchase money note is a waiver of the vendor's lien.—*Jackson v. Stanley*, 87 Ala. 270; *Kenney v. Ensminger*, 94 Ala. 536.

No counsel marked as appearing for appellee.

ANDERSON, J.—This bill was filed to enforce a vendor's lien upon certain lands described in the bill of complaint. The bill avers that one W. H. Stone, complainant's intestate, was the uncle of all the respondents, except W. J. T. Acree who was the father of the others. That the said Stone on Sept. 9th, 1897, was old and desired to make an advancement to his nieces and nephews, all of whom were minors at that time except W. C. Acree, and executed to them a deed, which describes the land and recites the "consideration of love and affection and the sum of \$600.00 cash in hand paid."

The bill avers that at the time the deed was made there was an agreement between his intestate and the father, and W. C. Acree, the only adult grantee, to the effect that the land was worth \$2,000.00, \$1,400.00 of which was to go as an advancement and the other \$600.00 was to be paid to the grantor. That the \$600.00 due is represented

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by the several notes of W. J. T. and W. C. Acree. It will be observed that the father is not one of the grantees in the deed, and that the notes are only signed by him and W. C. Acree, the adult grantee.

"The lien which equity, on principles of natural justice, creates a security for the purchase price of land sold and conveyed, is the subject of waiver, express, or implied from the acts of the parties. Generally, the lien will be regarded as waived, if the grantor accepts any distinct and independent security, the authorities vary in the application of the rule to particular facts; and it would be difficult to formulate a general definition, specific, and yet comprehensive enough to include all acts which will operate to displace the lien. Ordinarily, this result is produced by the acceptance of the note or bond of a stranger, or of the grantee with personal security, or with a mortgage on other land, or a pledge of stock, or other personal property. There are cases, in which no one of several acts is, of itself, sufficient. In such cases, all the facts and circumstances should be considered, and if it appears that the vendor did not intend to look to the land, but to rely on a substituted independent security, or on the personal responsibility of the vendee, the presumption is rebutted, and the retention of the lien repelled.—*Walker v. Struve*, 70 Ala. 167; *Carroll v. Shapard*, 78 Ala. 358; *Stringfellow v. Irie*, 73 Ala. 214; *Tedder v. Steele*, 70 Ala. 349; *Jackson v. Stanley*, 87 Ala. 273.

In the case at bar, judging from the averments of the bill, there was no waiver of the lien on the part of the grantor Stone, as it avers that the agreement of sale was made with the father, W. J. T. Acree and W. C. Acree and that their notes were taken for the amount the grantor was to get over and above what he wished to advance his nieces and nephews. The notes having been executed by W. J. T. Acree and W. C. Acree, the lien was not lost by reason of the fact that the conveyance of the land was made to the children of the said W. J. T. Acree. Whether the father acted in his own behalf or as agent for his children, the taking of his note instead of the grantees, would not, according to a more just

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and reasonable view, be interpreted into an intention to rely exclusively upon the personal credit of the father and W. C. Acree, (one of the grantees,) as the makers of the notes, to the exclusion of the vendor's lien.—*Davis v. Smith*, 88 Ala. 596; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718; *Pylant v. Reeves*, 53 Ala. 132; *Carter v. Eads*, 65 Ala. 190; *Jackson v. Stanley*, 87 Ala. 270.

The legal title to the land being in the children, they are proper parties to the bill.

The decree of the chancellor overruling the motion to dismiss and the demurrer is affirmed.

Affirmed.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

Birmingham Railway, Light & Power Co. v. Clemons.

Action against Street Railway by Passenger to recover Damages for Personal Injuries.

1. *New trial; quotient verdict; when not shown.*—When evidence is introduced tending to show that the verdict in a damage suit is, by pre-agreement of all the jurors arrived at by taking an assessment of damages for the plaintiff as made by each of the jurors, adding these assessments together, and then dividing the total by 12, such verdict is a quotient verdict, and illegal; but if it is shown that such process was resorted to without previous agreement that the result should be the verdict, but was tentative only as affording a basis for a subsequent consideration and discussion by the jury, the verdict thereafter rendered is not a quotient verdict, and is valid and legal.
2. *Motion for new trial; evidence of jurors.*—Where on a motion for a new trial, the verdict rendered is impugned as being a quotient verdict, it is competent for the plaintiff in whose favor the verdict was returned to prove by the jurors themselves in support of their said verdict that it was not arrived at by a process which constituted it a quotient or illegal verdict.

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APPEAL from the City Court of Birmingham.

Tried before the HON. W. W. WILKERSON.

This action was brought by the appellee, Eldonia Clemons, against the Birmingham Railway, Light & Power Company, to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on one of defendant's cars, which injury was caused by reason of the negligence of the defendant.

There were verdict and judgment for \$750.00. Subsequently, the defendant moved the court to be granted a new trial upon the following grounds: "1. For that said verdict is contrary to the weight of the evidence. 2. For that the damages assessed by the jury are excessive. 3. For that the verdict of the jury was arrived at in an improper and unauthorized manner. 4. For that the verdict was arrived at by adding up the amounts each juror thought should be given as damages, and dividing the sum they found by twelve. 5. For that the verdict of the jury is a quotient verdict. 6. For that the verdict is contrary to the charge of the court. 7. In support of this motion the defendant files the affidavits of Sam M. Blake and Wm. A. Walker." This motion for a new trial was overruled; and on the present appeal the assignments of error are based upon the court's refusal to grant a new trial. The tendencies of the evidence for the defendant and the plaintiff on this motion are sufficiently shown in the opinion.

WALKER, TILLMAN, CAMPBELL & MORROW, for appellant.—The verdict returned by the jury in this case was a quotient verdict, and was subject to all the criticisms made of such verdicts in the opinion rendered in the case of *Southern Railway Company v. Williams*, 113 Ala. 620. See also 28 Am. & Eng. Encyc. of Law, pp. 267 and 272 and notes.

DENSON & ULLMAN, *contra*.—To constitute a quotient verdict, there must be a previous agreement made by all the jurors to abide the result so reached. The verdict in this case was not shown to be a quotient verdict.—22 Am. & Eng. Ency. Pl. & Pr., p. 856-857; *Orange Belt*

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R. R. Co. v. Craver, 32 Fla. 28; *Cortelyou v. McCarthy*, 37 Neb. 742; *Luft v. Lingane*, 17 R. I. 420; *Barten v. The State*, 34 Tex. Crim. 613.

MCCLELLAN, C. J.—A quotient verdict will be set aside on proper motion and proof. The evidence adduced by the defendant on its motion to set aside the verdict in this case showed *prima facie* that it was arrived at by taking the assessments of the several jurors, adding them together and dividing the total by twelve, the number of jurors, and that this was done upon a pre-agreement on the part of all the jurors that the amount resulting by this process should be the verdict. If this evidence stood alone in the case on the motion, the verdict should have been set aside.—*Southern Ry. Co. v. Williams*, 113 Ala. 620. But this was not all the evidence. It was competent for the plaintiff to prove by the jurors themselves in support of their verdict thus sought to be impunged, that these figures were made and that this process was resorted to without previous agreement that the result should be the verdict, but tentatively only, and to afford a basis for subsequent consideration and discussion by the jury. This proof was, to our minds, satisfactorily made by the affidavits of the jurors Mitchell and Johnson. Upon the facts stated by them the verdict was not a gambling or quotient verdict, but was freely reached by the jury, without moral coercion thereto by any previous agreement to adopt the average of their several assessments as their verdict, but merely looking to that average as a suggestion for their consideration along with all other considerations bearing upon their ultimate finding.—*Wilson v. Berryman*, (Col.) 63 Am. Dec. 78, and notes; 22 Am. & Eng. Ency. Pl. & Pr. 856 et seq.

The other grounds of the motion, viz., that the verdict was not supported by the evidence, and that it was excessive in amount, are without merit; or at least we may say that we cannot affirm that the city court erred in not granting the motion upon them.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Whitehead v. Whitehead.

Proceeding for Appointment of Trustee.

1. *Trust and trustees; trustee has no power to appoint successor.*
A trustee has no power to appoint his successor in trust, unless such authority is expressly conferred on him in the instrument by which the trust was created.
2. *Same; personal representative does not succeed trustee.*—Under the provisions of the statute that upon the death of a trustee the trust estate does not descend to his heirs, or pass to his personal representative (Code §1044), the executor of the will of a trustee does not succeed to the right to administer the trust.
3. *Widow of trust not entitled to preference of appointment.*—The widow of a trustee is not entitled to be preferred in the appointment of a successor to her deceased husband to administer the trust estate.

APPEAL from the City Court of Bessemer in Equity.

Heard before the HON. B. C. JONES.

The proceedings in this case were instituted by the appellant, Lucy Whitehead, filing a petition in the City Court of Bessemer, asking for the appointment of an administrator and trustee of and for the estate of John Whitehead, deceased, with the will of said John Whitehead annexed. It was averred in the petition that under and by virtue of the will of John Whitehead, deceased, Joseph Whitehead, the son of John Whitehead, was nominated executor and named as trustee to carry out trusts created by the provisions of said will. The will is annexed to the petition as an exhibit, and it is shown that certain trusts were imposed upon the said Joseph Whitehead, as trustee, who was also named as executor.

It was further averred in the petition that Joseph Whitehead had died, and that the trust had not been fully performed. Subsequent to the filing of this petition, petitioner made a motion to dismiss the proceedings upon the grounds that Joseph Whitehead, who was nam-

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ed as trustee and executor in said will left a last will and testament, and named a testator; and that the title to the property of John Whitehead, deceased, and the trusteeship of said property descended to the testator of the last will and testament of Joseph Whitehead. Subsequently, there was filed a cross petition on the part of some of the children and heirs of John Whitehead, deceased, in which they asked for the appointment of the trustee. Demurrers were interposed to the original petition, and to the cross petition. On the submission of the cause, the judge of the city court rendered a decree overruling the motion to dismiss the petition, and granted the prayer of the cross petition, and named and appointed a trustee as successor in the trust under the will of Joseph Whitehead.

The original petitioner appeals from this decree, and assigns the rendition thereof as error.

BENJAMIN F. BAXLEY, *for appellant*.—Under the law, Joseph Whitehead, by reason of said trusteeship in his father's will, took said property mentioned therein, thereby creating in him the legal title to said property, or such an interest therein as he could and did convey to his executrix in his last will and testament, she being his legal successor under said will of John Whitehead, thereby creating in his executrix the same right, title, interests and trusts that were conveyed to him by said father in his last will and testament.—*Connell v. Cole*, 8 So. Rep. 72, and citations; *Anderson v. Northrop, et al.*, 12 So. Rep. 318, and citations; *Thorington v. Thorington*, 1 So. Rep. 716; *Robinson v. Pierce*, 24 So. Rep. 984.

J. A. ESTES and W. K. SMITH, *contra*.

TYSON, J.—The appeal in this cause is from a decree appointing a successor to Joseph Whitehead, deceased, who was appointed trustee by the will of his father, imposing upon him active duties to perform, and who before his death accepted the trust and entered upon the discharge of those duties.

No provision was made by the will for the appointment of his successor. In other words, no power was con-

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ferred upon Joseph Whitehead to name his successor. And under it he was without authority to do so.

As said by Mr. Beach in his work on Trusts and Trustees (§ 368): "The power to appoint a successor is not inherent to the office of a trustee. But the trustee of an express trust may be invested with this power by the settler or creator of the trust. When a trust is created by a deed or will, the trustees may be empowered to appoint their successors, but the power must be conferred by the instrument by which the trust was created. A trustee can delegate his power only as he is authorized to do it by the instrument creating the trust."

But it is said by appellants' counsel that the legal title to the trust estate was in the trustee and under his will his executrix succeeded to his right to administer it, notwithstanding he was not clothed with the authority by the instrument appointing him to name his successor.

To answer this contention we need only refer to section 1044 of the Code which provides that "upon the death of a sole or surviving trustee of an express trust, the trust estate does not descend to his heirs or pass to his personal representatives."

It is next insisted that as appellant is the widow of the testator, she is entitled to be preferred in the appointment of the successor to administer the trust estate.

The statute conferring preferences in the matter of granting letters of administration have no application here. The jurisdiction of the court to make the appointment is not challenged. And indeed, cannot be.

"It is a maxim of equity that no trust can be permitted to fail for lack of a trustee, and courts of equity have full authority to supply any lack of this character."—1 Beach on Trusts and Trustees, § 252.

What we have said disposes of all contentions made in brief of appellants' counsel.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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Mullen v. Walton, Admr. etc., *et al.*

Bill in Equity to have enforced an Express Trust and for an Accounting.

1. *Laches; constituents thereof.*—The laches which will deprive a party from claiming equitable relief is the intentional failure to resist the assertion of an adverse right; and, therefore, laches cannot be imputed to one who is ignorant of his rights, and for that reason alone fails to assert them.
2. *Enforcement of express trust; when laches not shown to exist; decedent's estate.*—A testator who left surviving him a wife and a minor child 11 years old, provided in his will that after a specific allowance to the wife, the balance of his estate should be divided equally between his wife and child, and also provided in the will that his wife should have the care, maintenance and education of his child and for that purpose he gave to the wife the control and management of all the moneys of his child under his will. The child was kept in ignorance of the provisions of her father's will, and knew nothing of the creation of the trust for her benefit. At different times the wife of the testator admitted her obligations to the child. The wife of the testator induced the child to go and live in a distant State with her aunts, and at no time did the wife make any provisions or give any moneys to the child or her aunts for her benefit. 37 years after the probate of the will of the testator, the wife died, leaving a substantial estate, and left a will which was invalid because not witnessed. By this will she bequeathed \$1500 to said child as "her rightful portion." After the death of the wife, the child, upon investigation, discovered for the first time the provisions of her father's will, and then a few months after the ascertainment of the facts filed a bill in chancery for the establishment and enforcement of the trust created by her father's will for her benefit and for an accounting. *Held:* that there was by the father's will created a trust for the benefit of the child, and the surviving wife was the trustee, and that by reason of the child having been kept in ignorance of her rights, she was not guilty of laches which would deprive her from seeking in a court of equity the establishment and enforcement of the express trust in her behalf as against the estate of the deceased wife.

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APPEAL from the Chancery Court of Chambers.

Heard before the HON. RICHARD B. KELLY.

The bill in this case was filed on July 15th, 1903, by the appellant, Charlotte Ewell Mullen, against J. M. Walton, as administrator of the estate of Martha A. Ewell, deceased, and the heirs of said Martha A. Ewell. The following facts were averred in the bill: Complainant was the only daughter of J. B. Ewell, deceased, who died in Waco, Texas, in October, 1865, leaving surviving him his second wife, Martha A. Ewell, and the complainant, who was then a child of 11 years of age. Mrs. Martha A. Ewell, the widow of J. B. Ewell, was the step-mother of the complainant. At the time of J. B. Ewell's death, he was a prosperous merchant and left an estate which was of value not less than \$6,000, and he owed no debts. J. B. Ewell, the father of complainant, left a last will and testament which was admitted to probate in McLennan County, Texas on Oct. 30th, 1865. A copy of this will was attached as exhibit "A" to the bill. After bequeathing to Martha A. Ewell, the household and kitchen furniture, it was provided in said will that the first \$2,000 realized from the estate should be retained by the said Martha A. Ewell, and that the remainder of the estate of complainant's father, after deducting said \$2,000, should be equally divided between said Martha A. Ewell and complainant, and to this end it was provided in said will that said Martha A. Ewell should take control of all the testator's property and effects, and hold the same for the purpose of carrying out the provisions of his will. One of the items of said will was in words and figures as follows: "It is my will that my wife have the care, raising and education of my said daughter as long as she desires the same, and I leave my wife for that purpose the care, control and management of all monies of my said daughter under this will, and in case of my said wife's death, or any other cause, my said daughter has to seek another home, then it is my wish that my two sisters, Mildred E. and Fannie B. Ewell, of Baltimore, Maryland, have the care of educating my said daughter Lotty and have the care and management of all the effects given her under this will;" etc. In said will Martha

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A. Ewell was expressly exempted from giving bond or making reports to any courts as executrix of said will, or as guardian of complainant.

It was averred in the bill that under the provisions of the will of complainant's father, there was created an express trust in behalf of complainant in and to one-half of all of J. B. Ewell's estate above \$2,000, which, at the time the property was reduced to money by sales, to-wit in the year 1867, amounted to a trust fund of \$2,000, and that said Martha A. Ewell was the trustee. The bill then avers the following further facts: The complainant has never received any benefits of said trust thus created by her father for her benefit, nor has she ever received any part or parcel of said trust fund of trust property. In January, 1867, complainant was persuaded by her said step-mother, Martha A. Ewell to go and live with her aunts in Baltimore, Maryland. Said Martha A. Ewell at the same time promising to send her money as soon as she got the affairs of the estate settled. The aunts of complainant paid the expenses of her maintenance and support and schooling, and have never received any money or property from said Martha A. Ewell; that in 1902, said Martha A. Ewell died, leaving an estate which was appraised during the proceedings of the administration thereof at over \$10,000.

After complainant went to live with her said aunts, said Martha A. Ewell wrote her about being unfortunate in the loss of large sums of money which she had loaned out, and several times prior to her death said Martha A. Ewell expressed in her letters to complainant an obligation to her to let her have the whole or a large interest in the property of said Martha A. Ewell when she died.

The statement contained in one of these letters is copied in the opinion. At the time of the death of complainant's father, complainant being only 11 years old, she was too young to understand the importance of posting herself as to the provisions of her father's will in regard to her, and from that time on to a few months within the filing of the present bill she was kept in ignorance of the provisions of said will, and knew nothing about the existence of a trust in her favor, which was to be admin-

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istered by said Martha A. Ewell. When the said Martha A. Ewell died in October, 1902, she left an unwitnessed autograph will, in which she bequeathed to complainant \$1500 as "her rightful portion," and directed her executor to see that she obtained such portion. Such will being unwitnessed, was never probated.

After having seen said will, the complainant, on the advice of her attorney, obtained a copy of her father's will, and then learned for the first time of its provisions, and the present bill was filed within a few months after the ascertaining of such information. The prayer of the bill was as follows: "May it further please your Honor to render a decree in behalf of oratrix, establishing the creation of a trust in favor of oratrix under her said father's will, as well as the non-performance or breach of the same by the said trustee, Martha A. Ewell, deceased, and declaring a lien in favor of oratrix upon all the assets of the estate of the said Martha A. Ewell for the enforcement of said trust by realizing to oratrix the principal of said trust fund, as well as legal interest and profits thereon; and that it be referred to the register to ascertain by an accounting before him the exact amount of said trust fund as nearly as may be, which came into the hands of said Martha A. Ewell, deceased, as well as the interest and profits for the use and retention of same with which her estate is to be charged, to the end that oratrix may recover out of the estate of said Martha A. Ewell the amount of principal and interest which is justly due and owing to her; and that said J. M. Walton, as such administrator, be decreed to pay to orator the sum so found to be due out of the assets and proceeds of said estate." There was also a prayer for general relief. The respondents demurred to the bill upon the following grounds: 1. Said bill shows on its face that it is one for the enforcement of a stale claim. 2. Said bill shows on its face that the complainant cannot recover in said cause because of her laches in seeking the enforcement of her alleged rights. 3. Said bill shows long acquiescence by the complainant in the alleged wrong done her, and yet it fails to show that she could not by diligence sooner discovered her rights under

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her father's will. 4. The bill shows that the will of the complainant's father was admitted to probate in the proper county and that by proper diligence on her part she could have seen said will and could have discovered her rights thereunder. 5. The bill shows that the will of complainant's father, upon which is based the claim her bill is filed to recover, was probated Oct. 30th, 1865, and recorded on the public records of McLenan Co., Texas, more than 42 years before this bill was filed, does not aver nor show any fraud practiced upon complainant by M. A. Ewell, nor any recognition by M. A. Ewell of a trust created and imposed on her by said will, but avers mere ignorance of her right on the part of complainant, without excusing or explaining its unreasonable continuance.

The respondent also moved to dismiss the bill for the want of equity. Upon the submission of the cause upon the motion to dismiss and the demurrers, the chancellor rendered a decree sustaining each of them. From this decree the complainant appeals and assigns as the rendition thereof as error.

ARMSTEAD BROWN, for appellant.—A *cestui que trust* who does not actually know, is not be affected with knowledge of a breach of trust, because he might by inquiry, have ascertained the fact, for it is not his duty, but that of the trustee, to see that the trust fund is in proper state.—2d edition 18th Am. & Eng. Ency. of Law, p. 103; *Holt v. Wilson*, 75 Ala. 58-66-67; 2nd Pomeroy, Eq. Juris. p. 663. "Lapse of time is no bar to the enforcement of an express trust unless it is clearly repudiated, and this is brought home to the knowledge of the *cestui que trust*, so as to require him to act upon a clearly asserted adverse claim."—2nd Perry on Trusts, Sec. 863; *Hastie v. Aiken*, 67 Ala. 313; 2nd Pomeroy's Eq. Juris. sec. 1083; *Nettle v. Nettles*, 67 Ala. 599; 1 L. R. A., 328 330; 8 L. R. A., 649; 63 Am. Dec., 475; Angell on Limitations, sec. 166, 172; *McCarthy v. McCarthy*, 74 Ala. 555. The constructive notice afforded by the probate of the will, did not charge the appellant with a knowledge of her rights.—*Haney v. Legg*, 129 Ala. 625; *McCarthy v.*

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McCarthy, supra. What it takes to constitute laches, is well stated by Tyson J. in *Haney v. Legg, supra*, p. 625, as follows: "Staleness or *laches* is founded upon acquiescence in the assertion of adverse rights and unreasonable delay on complainant's part in not asserting her own, to the prejudice of the adverse party"—citing numerous authorities. See also 18th Am. & Eng. Ency. Law., 102 (2nd ed.); *Cowan v. Sapp*. 81 Ala. 525.

OLIVER & THIGPEN and BARNES & DUKE, *contra*.—The complainant has been guilty of fatal laches in failing to seek the enforcement of her alleged rights for more than forty-two years after they accrued, for more than thirty-six years after the alleged breach of the trust occurred, and for more than ten years after she, by the allegations of her bill, in paragraph 5, acquired knowledge of the breach of trust, and in waiting until the lips of Martha A. Ewell have been closed in death and it is no longer possible to secure her testimony concerning the breach of trust with which she is charged.—*Gordon v. Ross*, 63 Ala. 363; *James v. James*, 55 Ala. 525; *Martin v. Talley*, 72 Ala. 23; *Nettles v. Nettles*, 67 Ala. 599; *Scruggs v. Decatur M. & Z. Co.*, 86 Ala. 192 5 South. 440. The bill on its face shows that the claim sought to be enforced is *prima facie* within the operation of the rule against stale demands, and vague averments are used to seek to withdraw it from same.—3 Brickell, p. 366, Sec. 464; *Philippi v. Philippi*, 61 Ala. 41; *Bercy v. Lavretta*, 63 Ala. 374.

SIMPSON, J.—The bill in this case was filed by the appellant against appellee, for the purpose of forcing an accounting and settlement of an express trust created by the will of appellant's father, under which appellant's step-mother (appellee's intestate) became trustee, more than twenty years before the filing of the bill, when appellant was only eleven years of age.

The case comes up on the decree of the chancery court, sustaining demurrers to the bill and granting the motion to dismiss for want of equity, and the only question raised by the assignments of error is whether or not the

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appellant has been guilty of *laches*, as bars her right to relief.

The decisions of this court are very strong on the doctrine of prescription, holding that the period of twenty years is one "beyond which human transactions shall not be open to judicial investigation," and this period of repose has been made applicable to all kinds of pecuniary obligations, including fiduciary demands in favor of *cestuis que trust*.—*McArthur v. Carrie's Admr.*, 32 Ala. 75, 88; *Garrett v. Garrett*, 69 Ala. 429; *Semple v. Glenn*, 91 Ala. 245, 261, et seq.

This presumption, when applied to the liability of trustees, or others occupying fiduciary positions, requires that there shall have been no recognition of the trust within the period of twenty years.—*Semple v. Glenn*, *supra*.

In the case at bar the bill alleges that. during the year 1892, the appellees' intestate wrote a letter to appellant in which she stated (referring to her property) "I shall leave it all to you, because I lost most all of that \$4,000, when you were a child, part of which your father intended for you, and it will only be right for you to have it when I am done with this world."

We are not left to this expression for information as to what the trust was, for the will of appellant's father shows a clear trust, and we hold that this reference to it is a clear acknowledgment that, at that time, the obligations of the trust had not been fulfilled, and, taken in connection with this acknowledgment, the clause in the attempted autograph will of the step-mother giving to appellant \$1500.00, "her rightful portion," amounts to an acknowledgment that the obligation was still unfulfilled.

It has been said that the *laches* which will deprive a party of claiming equitable relief is the "intentional failure to resist the assertion of an adverse right" and that consequently there cannot be acquiescence, "without knowledge on the part of the person of the infringement of his legal rights."—18 Am. & Eng. Ency. Law, (2nd ed.) p. p. 99, 113 and notes; Pomeroy's Eq. Juri. § 817;

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Haney v. Legg, et al, 129 Ala. 619, 625-6; *James v. James*, 55 Ala. 525, 533.

Where there is added to that ignorance, the additional element of fraudulent concealment, by the party sought to be charged, from the party seeking relief, of the facts constituting the rights claimed, it would seem to be a strange perversion of a wise principle of law, to allow the party guilty of the fraud to profit by his own wrong, and to presume that the trust had been settled when the evidence shows that the trustee was concealing it, with the determination of not settling it, and that the *cestui que trust* had been kept in ignorance of his rights, by the act of the other party.

"No lapse of time, no delay in bringing suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud.—Pomeroy's Eq. Juri. (2nd ed.) Vol. 2, § § 917, 965; *Kilbourn v. Sunderland*, 130 U. S. 505, 518-19; *Kirby v. Lake Shore & M. S. R. R.* 120 U. S. 130, 136.

It has been well said by the Supreme Court of the United States, that, "to hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure.—*Rosenthall v. Walker, assignee*, 111 U. S. 185, 190.

This principle of equity has been made applicable to the statute of limitations, where there was no statutory provision for the same, but our legislature has made it applicable to the statute of limitations.—Code of 1896, § 2813.

While the statute is not strictly applicable to the equitable doctrine of *laches*, stale demands, or prescription, and while there is a difference in the theory upon which the statute and the equitable doctrine operate, yet the statute shows the legislative mind, and the cases are analogous so far as this principle is concerned. Accordingly we find that this principle has been applied to the

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equitable presumption.—Story's Equity Pleading, (10th ed.) § 813, note 1; *Moddaugh et al v. Fox, et al*, 135 Ill. 344, 358; *Penn v. Folger*, 182 Ill. 77, 109.

In a case where the widow had destroyed the marriage contract, which was not recorded, and failed to disclose its existence for more than twenty years, this court held that the heirs were not guilty of *laches*, but had one year after the discovery of the fraud to bring suit,—*Holt v. Wilson*, 75 Ala. 58, 66, and the court say, "When this (fraud) is coupled with the existence of a fiduciary relation between the parties, rendering disclosure both the moral and legal duty of the trustee, a court of conscience can scarcely preserve its self respect and, at the same time, hesitate for one moment to grant relief."—p. 66-7 *Ib*.

The infancy and non-residence of the complainant, in that case, and other circumstances make it, in several respects, analogous to the case now under consideration. See also same case, 83 Ala. 528, 539.

The only remaining question is, whether or not the constructive notice from the recording of her father's will in Texas, was sufficient to put the appellant on inquiry as to her rights? We think not.

The court has said in another case, "We do not think, however, that the constructive notice of the nature of M's. possession, as imported by these deeds, should charge the complainant with a knowledge of her rights. The blind ignorance in which she seems to have been kept, by the fraudulent conduct of her trustee, was sufficient to drown all suspicion of unfairness, and stupefy the activity of inquiry."—*McCarthy v. McCarthy*, 74 Ala. 555.

In the case, under consideration, we hold that the facts, as alleged in the bill, that appellant, at the tender age of eleven, was sent away into another State, where she was raised by her aunts, under the impression, made by her step-mother, that there was nothing due her from her father's estate, but that the step-mother was going to provide for her out of her own estate, was enough to "stupefy the activity of inquiry," and she was not chargeable with notice by reason of the record in Texas.

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The decree of the court is reversed and a decree will be here entered by this court overruling the demurrers to the bill and the motion to dismiss for the want of equity, and allowing the respondents sixty days within which to answer.

MCCLELLAN, C.J., TYSON and ANDERSON, J.J., concurring.

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Action to recover Benefit from Life Insurance.

1. *Trial without jury; conclusion and judgment of the court upon the evidence must be shown in bill of exceptions, and exception must be shown, before same can be reviewed on appeal.* In the trial of a cause by the court without the intervention of a jury the bill of exceptions must show what the conclusion and judgment of the trial court on the evidence were, and unless the same are disclosed, the Supreme Court is without jurisdiction to review the action of the trial court in that behalf, although it may appear from the minute entry what judgment was rendered. If the bill of exceptions discloses the judgment but fails to contain an exception thereto, the ruling of the trial court cannot be reviewed.
2. *Same; same; case at bar.*—Section 14 of the Acts of 1875-6, providing for the trial of causes by the City Court of Selma, without a jury, authorizes a review by the Supreme Court of the conclusion and judgment of the City Court of Selma upon the evidence, only when such conclusions and judgment are shown in the bill of exceptions and the bill of exceptions contain exceptions thereto.
3. *Same; same; rulings of the trial judge upon the admissibility of evidence may be reviewed, when properly presented by bill of exceptions, when the judgment and conclusions on the evidence cannot be reviewed.*—The fact that the judgment of the trial court, where a cause is tried without a jury, cannot be reviewed on appeal, because the bill of exceptions fails to show what the judgment was and fails to note exceptions thereto, does not prevent the review by the Supreme Court of the

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rulings of the trial judge upon the admissibility of evidence (Overruling *Alatama Fruit Growing and Winery Association v. Garner*, 119 Ala. 70.)

4. *Same; same; same; case at bar.*—In an action by the heirs at law of an intestate to recover, from the step-son of such intestate, the amount paid by a benefit society to such step-son, on an insurance policy in such society, where the laws of the State and the rules of the order, at the time the policy was issued, required that the beneficiary be either a "member or members of his family, blood relations or person or persons dependent on him" the ruling of the trial court as to the facts, and the soundness of his conclusions and judgment, where same are not shown by the bill of exceptions and exception shown to have been taken thereto, are presumed to have been correct, unless based on evidence improperly admitted.
5. *Construction and interpretation of laws of benefit order by its officers; not binding on courts or members of order.*—The decisions of a benefit order, or of its officers, has no binding effect on the members or their beneficiaries, and the construction given to any of the provisions of a contract of insurance by the officers of the society is not binding on the courts, and the members are not bound by any acts, which may have been done by them under such a construction. Evidence showing such decisions and interpretations is properly excluded.
6. *Evidence; when that relating to family relations and surroundings of intestate is admissible.*—Where an issue in a case is whether or not defendant was a member of intestate's family, evidence relating to the family relations and surroundings, the exercise of dominion and control by the intestate over the household, of which defendant was one, and the ownership of the house in which they resided as one and the same family, is pertinent to show that defendant was a member of intestate's family and that intestate was the head thereof, and is properly admissible.
7. *Defendant may show his right and title to thing in controversy.* While, as a rule, the plaintiff has to rely on the strength of his title to the thing in controversy, this doctrine does not preclude the defendant from showing a right and title thereto.
8. *Same; case at bar.*—In an action by the heirs at law of an intestate to recover from the intestate's step-son, who has been named as beneficiary in a benefit certificate, the proceeds of such certificate, the application of membership of intestate, the benefit certificate to intestate's wife, who was also de-

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defendant's mother, the surrender after her death, the benefit certificate of defendant, the payment of assessments by the insured and the proof of his death, relate to the history of the insurance contract and to the defendant's right and title thereunder, and are properly admissible in evidence.

APPEAL from the City Court of Selma.

Tried before the Hon. J. W. MABRY.

This is an action by the appellants, A. J. and Robert H. Morey and Mrs. Helen M. Niles, to recover from the appellee, W. S. Monk, two thousand dollars, being the proceeds of a benefit certificate in the Knights of Honor on the life of plaintiff's intestate, Major R. R. Morey. Major Morey in his life time was a member of the Knights of Honor, a benefit society incorporated under the laws of Missouri. His original benefit certificate was payable to his wife, Mrs. Almira Morey. She died in 1886. From her death in 1886 until 1891, when Major Morey had another certificate issued made payable to William S. Monk, his step-son, no beneficiary had been designated. In 1902, Major Morey died, leaving no wife and no children nor descendants of children, but leaving as his heirs at law the plaintiffs in this case, A. J. Morey, Robert Morey and Helen M. Niles, his two brothers and his sisters. The Knights of Honor paid the amount of the benefit certificate to William S. Monk, whereupon the brothers and sister of the deceased member, Major Morey, bring this suit against him to recover this money. The complaint contained the common counts for money had and received to the use of plaintiffs, and the following special count: "Plaintiffs claim of defendant the sum of two thousand dollars, the proceeds of a benefit certificate in the Knights of Honor, on the life of plaintiff's intestate, had and received by the defendant on to-wit, May 1st, 1902, to the use of the plaintiffs, which sum of money with the interest thereon, is due and unpaid, and is the property of the plaintiffs." Issue was joined on the plea of the general issue. The case was tried by the judge of the city court of Selma without a jury. The section of the act establishing the city court of Selma, in regard to trials by the court

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without a jury, is set out in the opinion. The charter of the Knights of Honor provides for the payment of the benefit fund to such "member or members of his family, blood relatives, or person or persons dependent on him as he may direct and designate by name." The opinion contains a statement as to the provisions of the statutes of Missouri, in which State the Knights of Honor were organized, and the laws of the order, regulating what persons may be named as beneficiaries. The plaintiff offered to introduce in evidence six decisions of the Supreme Dictator of the Knights of Honor, bearing upon the questions involved. To the introduction of these decisions of the Supreme Dictator, the defendant objected. The court sustained the objections of the defendant, and the plaintiffs duly excepted, and assign the action of the court in sustaining such objections as error. The defendant asked the witness Parrish the following questions: "Who provided for that family while you were there?" "Who composed Major Morey's family when you left Major Morey's family?" "Whether or not there was a family garden spot or garden." "Who attended to the cultivation of the garden." "Did not Major R. R. Morey have general supervision of the place up to the time of his death?" The plaintiffs objected to the asking of each of said questions. The court overruled these objections, and to the action of the court in overruling each of said objections, the plaintiffs separately and severally excepted. The defendant's counsel asked defendant, as a witness: "Whose orders and requests, if any one's, did you obey during the time from Mrs. Morey's marriage to the time of defendant's marriage?" To this question the plaintiffs objected, and duly excepted to the action of the court in overruling such objection. The defendant asked the witness, Mrs. Morey, a sister-in-law of Major Morey, the following questions: "Who supplied the groceries up to that time (November, 1890) from July?" "Was it (the provision for maintenance of the household) that year (October, 1890, to October, 1891) as it had been in the years previous?" The plaintiffs objected to each of these questions, and sepa-

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ately excepted to the action of the court in overruling each of said objections. The defendant asked the witness Mrs. Monk, the question: "Who administered to the wants and comforts of Major Morey from the time of your marriage to Mr. Monk to the time of Major Morey's death?" To this question the plaintiffs objected, and duly excepted to the action of the court in overruling such objection. There was judgment for the defendant, but the bill of exceptions does not show that the plaintiff excepted to the rendition of such judgment. From this judgment the plaintiff appeals, and assigns the various rulings of the trial court, as set out above, and the rendition of such judgment, as error.

MCLEOD & VAUGHAN, and J. E. WILKINSON, for appellants.—In the event of failure of designation, or invalid designation, the benefit is payable as provided by the laws of the order. In this case, the designation was invalid; therefore, the benefit was payable as provided by the laws of the order, as in failure of designation. Beneficiary be "a member of the family, widow, orphan or kindred dependent of the members." Defendant belongs to none of these classes unless it is the family. Defendant had no insurable interest in the life of Major Morey; the society had no power to create a fund payable to any one who stood in relation to step-son to a member of the society; the designation of defendant as beneficiary being invalid, the benefit was payable to the heirs at law, the plaintiffs in this case; the relation of step-son did not constitute defendant a member of intestate's family, and if it did, the relation was dissolved by the death of defendant's mother.—Bacon on Ben. So. & Ins., § 250, p. 479, Vol. 1; Biddle on Ins., Vol 1, p. 188; *U. B. Aid Society v. McDonald*, 122 Pa. 24; Ency. of Law, Vol. 3, p. 938; Right, Remedies & Practice, Vol. 4, p. 3635; 9th Amer. St. Report, 111; *Gilbert v. Moose*, 13 Insurance Law Journal, 297. A person's family does not embrace step-children; certainly not unless the step-child is dependent upon the step-father. It is the relation and the dependence on the relation, and not the aggregation of

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individuals that constitute a family.—*Allen v. Manassee & Moseley*, 4 Ala. 556; 17 Ala. 488; 55 Ala. 354. The family must be persons who are dependent in some measure on the head for support. When defendant was a minor dependent upon Major Morey for his support or education, he may have been a member of the family; after his arrival at majority, independent of Major Morey for support, death of his mother, and marriage, he cannot be held to be a member of intestate's family.

PETTUS, JEFFRIES and PARTRIDGE, *contra*.—The conclusions and judgment of the trial court must be presented by the bill of exceptions, or they cannot be reviewed on appeal. Moreover, an exception must be shown to have been reserved to the judgment, or it can not be reviewed.—*Hood v. Pioneer M. & M. Co.*, 95 Ala. 461.

To the conclusions of the trial court on the evidence, there was no exception shown by the bill of exceptions to have been reserved.. Hence this court is without authority to review such conclusions. This court has, consequently, no jurisdiction to review the evidence and cannot consider the rulings of the lower court thereon. *Williams, Admr. v. P. M. M. Co.*, 106 Ala. 256. The rulings of the trial court, under the circumstances, even if erroneous, cannot work a reversal of the judgment. *Ala. Fruit G. Assn. v. Gardner*, 119 Ala. 70; *Denson v. Gray*, 113 Ala. 609; *Hood v. Pioneer M. & M. Co.*, 95 Ala. 462.

In determining the limitations of the word "family," the statute must be construed liberally, and in such manner as to carry out the benevolent purpose sought to be provided for.—*Am. L. of H. v. Perry*, 140 Mass. 589; *Ballou v. Gile*, 50 Wis. 614. Family, in an extended sense, comprehends all the individuals who live under the authority of another.—*Whaley v. Whaley*, So. Mo. 577.

The courts are the forums for the construction of the contract, and the rulings of the officers of the order are inadmissible.—*Wiggins v. K. of P.*, 31 Fed. Rep. 122; Vol. 142.

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Niblack on Ben. Soc., 143, 145; *Davidson v. Sup. Lodge of K. of P.*, 22 Mo. App. 263.

Those questions the answers to which shed light upon the question of whether or not Monk was a member of Morey's family were certainly admissible.—*G. L. v. Ministry*, 67 Mo. App. 82; *Duncan v. Frank*, 8 Mo. App. 286.

The papers admitted in evidence go to show the history of the transaction and the chain of appellee's title, and were properly admitted.

ANDERSON, J.—This case was tried by the judge of the city court of Selma without a jury, and judgment was rendered for defendant, and the appeal is taken from said judgment.

Section 14 of the Acts of 1875-76, p. 390, establishing the city court of Selma is as follows, to-wit: "Be it further enacted, That in the trial of any cause at law without a jury, in addition to the questions which may be presented to the Supreme Court for review, under the existing laws and rules of court, either party may, by a bill of exceptions, also present for review the conclusion and judgment of the court upon the evidence; and the Supreme Court shall review the same without any presumption in favor of the ruling of the court below on the evidence, and in case there be error, shall render such judgment in the cause as the court below should have rendered, or reverse and remand the same for further proceedings, as to the Supreme Court shall seem right."

The bill of exceptions, not only fails to disclose any exception to the judgment of the court below, but fails to show what was the judgment. In construing provisions expressed in the same language, relating to the county court of Cleburne county, § 12, p. 808 Acts 1896-7, "Regulating proceedings in civil cases in Jefferson county," (Acts, 1888-89, § 7, p. 800), and creating the city court of Gadsden, (Acts 1890, § 14, p. 1098), our court has held that the bill of exceptions must show what the conclusion and judgment of the trial court were, and unless the same are disclosed, this court is without jurisdiction to review the action of the trial

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court in that behalf, although it may appear from the minute entry what conclusion was reached and what judgment was rendered.—*Alabama Fruit Growing & Winery Association v. Garner*, 119 Ala. 70; *Williams v. Woodward Iron Co.*, 106 Ala. 254; *Denson v. Gray*, 113 Ala. 608.

It has also been held that even if the bill of exceptions disclosed the judgment and failed to contain an exception thereto, that the ruling of the court cannot be reviewed.—*Hood v. Pioneer Mining & Mfg. Co.*, 95 Ala. 461.

The only assignments of error, other than the correctness of the finding of the court, relate to rulings on the admissibility of the evidence. Since the judgment can not be reviewed, we are forbidden by the case of *Alabama Fruit Growing & Winery Association v. Garner*, *supra*, from passing upon the rulings of the trial judge upon admissibility of the evidence. But we consider the doctrine therein declared upon this particular proposition, unsound, and the same is hereby overruled. This case seems to be based upon the opinion in *Denson v. Gray*, *supra*, but a careful examination of the last named case, will disclose the fact that this point was not adjudicated and there were no facts calling for the misleading expression on the subject, which doubtless influenced the writer of *Alabama Fruit Growing Winery Association v. Garner*, *supra*.

It appears from the record that the sole issue before the trial judge, was, whether or not W. S. Monk, the substituted beneficiary, after the death of his mother, the original beneficiary, belonged to a class capable of taking, under the rules of the order and the statute of the State of Missouri regulating said order? At the date of the issuance of the benefit certificate, the statute of Missouri, the State in which the Knights of Honor were incorporated, restricted such societies in the payment of benefits, to families, widows, orphans or other kindred dependents of deceased members. The charter of the association provides for the payment of the benefit fund to such "member or members of his family,

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blood relations or person or persons dependent on him as he may designate by name.”—Article 9, § 4, of the order.

Section 6 of the article, provides that “upon the death of the original beneficiary designated by the member, before the decease of such member, if he shall not have procured another benefit designating other beneficiaries, in accordance with the requirements of § 4 of this article, the benefit shall be paid to the widow and children of the deceased member, if no widow to his children, if no children to his widow, and if neither widow nor children, then to his heirs. And if no person or persons be entitled by the laws of the order to receive such benefit, it shall then revert to the Widow and Orphan benefit fund.”

Plaintiff's contention is, that upon the death of Mrs. Morey, the original beneficiary, Maj. Morey had the right to name another, but that the one so named had to belong to one of the classes enumerated in section 4 of the article, and that the defendant Monk, while a step-son of the insured, did not come under either class of beneficiaries. That the designation of Monk as a beneficiary was invalid, and while he was named as such and collected the \$2,000.00, being unable to take under the statute and the rules of the order, he collected this money for the benefits of the plaintiffs, who are entitled thereto as the heirs of Maj. Morey.

The defendant contends, however, that the designation was not invalid, as he was a member of the family of Maj. Morey, the insured, and therefore comes within one of the enumerated classes.

The trial judge had this question to determine and which seems to have been the sole issue, and as we are unable to review his ruling on the facts, or to question the soundness of his conclusion, we will have to pass upon the admissibility of the evidence, with reference to its application to this particular issue, and with the assumption that the conclusion of the trial judge was correct, unless based on evidence improperly admitted.

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Assignments of error 1, 2, 3, 4, 5 and 6 refer to the ruling of the judge in sustaining objections of the defendant to the introduction of construction and interpretation of the laws of the order by the Supreme Dictator. The decision of the order or of its officers, were of no binding effect on these parties.—*Manson v. Grand Lodge*, 30 Minn. 509. The construction given to any of the provisions of a contract of insurance by the officers of the society is not binding upon the courts, and the members cannot be bound by any acts which may have been done by them under such a construction.—Niblack on Ben. Soc.; § 143; *Wiggins v. K. of P.* (C. C.) 31 Fed. Rep. 122; *Davidson v. Supreme Lodge K. of P.*, 22 Mo. App. 263.

Assignments 7, 8, 9, 10, 11, 17, 19, 20, 21 and 22 relate to the admissibility of evidence relating to the family relations and surroundings, the exercise of dominion and control by Maj. Morey over the household and the ownership of the house in which they resided as one and the same family. The evidence was not only pertinent to show that defendant was a member of Maj. Morey's family, but that Morey was the head thereof and, therefore, related to the sole issue in the case.—Niblack on Ben. Soc., §§ 194, 195; *Grand Lodge v. McKinstry*, 67 Mo. App. 82.

The other assignments refer to the admissibility of the application of membership, the benefit certificate to Mrs. Morey, the surrender after her death and the benefit certificate of the defendant and the payment of assessments by the insured and the proof of his death. All of this evidence related to the history of the insurance contract and to the defendant's right and title thereunder. As a rule the plaintiff has to rely on the strength of his title, but we do not understand such a doctrine as precluding the defendant from showing a right and title to the thing in controversy.

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We do not mean to express an opinion, as to whether or not the plaintiff could recover this money after the order had paid it to the defendant, who was the beneficiary named in the policy.

Affirmed.

McCLELLAN, C. J., HARALSON, TYSON, DOWDELL, SIMPSON, and DENSON, J.J., concurring.

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Bill in Equity to Quiet Title to Land.

1. *Appeal does not lie from decree overruling a motion to dismiss cross-bill.*—An appeal does not lie to the Supreme Court from a decree of a chancellor overruling a motion to dismiss a cross-bill for the want of equity therein; the statute authorizing an appeal from an interlocutory decree overruling a motion to dismiss a bill for the want of equity, (Code § 427) having application solely to a bill in equity, and not a cross-bill.

APPEAL from the Chancery Court of Lowndes.

Tried before the Hon. WILLIAM L. PARKS.

Under the opinion in this case it is unnecessary to make a statement of facts.

McCLELLAN, C. J.—This is an (attempted) appeal from a decree overruling a motion to dismiss a *cross bill* for want of equity. The appeal is not authorized by statute. There is a statute authorizing an appeal from an interlocutory decree overruling a motion to dismiss *a bill* for want of equity, (Code, § 427); but there is no statute providing for appeal from such decree in respect of a cross bill. The appeal must be dismissed.

Appeal dismissed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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[Morningstar v. Querens.]

Morningstar v. Querens.*Action for Rent on written Lease.*

1. *Evidence; what sustains averment of complaint.*—Where the complaint described the leased premises as “being the building which was on the date of the demise of the property occupied by R. Seal as a grocery store,” and the lease which is introduced in evidence describes the property as “being the building which is now occupied in part by R. Seal as a grocery, and Johnson Bros. as a saloon,” there is no variance between the pleading and the proof.
2. *Plea of the general issue; right of the plaintiff to maintain suit, cannot be raised under.*—Where the suit is for rent, and the only plea is the general issue, the right of the sole plaintiff, who is shown to be a married woman, resident in the State of Louisiana, to maintain the suit, cannot be raised. That plea putting in issue only the truth of the allegations of the complaint, and not challenging the right of the plaintiff to maintain the suit, which can only be raised by a plea in abatement.
3. *Parol evidence; when not admissible.*—Where the suit is for rent under a written lease, and the only plea is the general issue, it is not competent to show the breach of a parol agreement, it is not competent to show the breach of a parol agreement was made prior to or contemporaneously with the written lease, the evidence would violate the salutary rule against introducing parol evidence to alter or add to a written agreement, and if made after the execution of the lease, it was without consideration. Moreover in either aspect this evidence would not be admissible under the plea of the general issue as this defense could only be raised under a plea of recoupment or set-off.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. WM. S. ANDERSON.
The facts are sufficiently stated in the opinion.

[Morningstar v. Querens.]

FITTS & STOUTZ, for appellant.—There was a failure of proof by the plaintiff. In an action for rent nothing can be more material than the description of the premises claimed to have been rented. The material averment was traversed by the plea of the general issue, and the burden was on the plaintiff to prove every material allegation in her complaint, including, of course, the identity of the premises occupied.—*Lehman v. Shiver*, 129 Ala. 319; *McGhee v. Cashan*, 130 Ala. 568.

The general affirmative charge should not have been given, because Mrs. Querens, a married woman, was the sole party plaintiff, and the rented premises were in the State of Mississippi. The presumption is the common law prevails in that State. At common law the wife could not sue alone for the rents of her property.

The evidence would have shown a contract of leasing, partly oral and partly written, and the oral would not have contradicted the written.

GREGORY L. & H. T. SMITH, *contra*.—The case of *Thompson Foundry & Machine Co. v. Glass*, 33 So. Rep. 811, is a complete and perfect justification of the ruling of the circuit court on the evidence, but even if the ruling were otherwise in this State, under the pleadings in this case the evidence would have been inadmissible, as there was not a plea of set-off or recoupment.—*Fowler v. Payne*, 49 Miss. 32.

There is no presumption that the common law prevails in Louisiana, the State of Mrs. Querens' residence. The cases of *Kennebrew v. Southern Automatic Electric Shock Co.*, 106 Ala. 377, and *Peet & Co. v. Hatcher*, 112 Ala. 514, fully establish the proposition that the presumption that the common law prevails in other States in the Union is confined to those States whose laws are of common law origin, and has no application to States like Louisiana and Texas.

TYSON, J.—This is an action brought to recover certain installments of rent due by defendant to plaintiff upon a written lease, executed by them both.

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The only plea interposed was the general issue. On the trial the general affirmative charge was given at the written request of plaintiff.

It is first insisted that plaintiff failed to prove that averment of the complaint which is in these words; "being the building which was on the date of the demise of said property occupied by R. Seal as a grocery store." The lease introduced in evidence describes the property as "being the building which is now occupied in part by R. Seal as a grocery and Johnson Bros., as a saloon." We do not think the contention meritorious. The recitals of the lease above quoted, which was in evidence, certainly fills the allegation of the complaint, it not being averred that Seal was the exclusive occupant of the building. The averment was simply to designate the property in which the rooms leased were located, which the evidence undisputably shows defendant took possession of and paid installments of rent under the lease.

It is next insisted that because the evidence shows that plaintiff was a married woman, residing in the State of Louisiana, at the date of the execution of the lease and also when this suit was brought, that she should not have been allowed to recover. This contention is predicated upon the proposition that her husband was a necessary party plaintiff. If the soundness of this proposition be conceded, the plaintiff's right to maintain the action was not challenged by the plea of the general issue, which under the statute, (§ 3295 of the Code) puts in issue only the truth of the allegations of the complaint. If it was desired to raise the question of non-joinder of the husband as a party plaintiff, this could only have been done by a plea in abatement.—*Berlin v. Sheffield Coal, Iron & Steel Company*, 124 Ala. 322.

The remaining assignments of error are based upon the rulings of the court in sustaining objections to certain questions propounded by defendant, the purpose of which were to elicit testimony to show that a breach was made by plaintiff of an oral agreement to make additions to the leased building. If the agreement was made

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prior to or contemporaneously with the execution of the lease, the evidence was clearly not competent upon the principle declared in *Thompson Foundry & Machine Company v. Glass*, 136 Ala. 648. If made after the execution of the lease, conceding the authority of the agent to bind her, no consideration is shown for it. However, the evidence was not competent under the plea in this case. If defendant wished to interpose this defense, he should have interposed a plea of recoupment or set-off. This disposes of all the assignments of error insisted on.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

Travis v. Rhodes.

Action for Statutory Penalty for not entering Partial Payment on Recorded Judgment.

1. *Penalty for failing to enter partial payment on record of recorded judgment; liability of assignee of judgment previously recorded by assignor.*—The assignee of a judgment, which had been recorded by the assignor in the office of the judge of probate, before the assignment, is liable for the statutory penalty provided by sections 1065 and 1923 of the Code for failing within thirty days to enter partial payments made him on the margin of the record of the judgment, after being requested so to do.
2. *Same; sufficiency of complaint.*—Where the certificate of a judgment was filed in the probate office prior to the act of February, 1899, amending sections 1065 and 1066 of the Code, the complaint, in an action to recover statutory penalty for failing to enter partial payments on record, should aver that the certificate filed contained the name of the owner of the judgment.

[Travis v. Rhodes.]

APPEAL from Circuit Court of Butler.

Tried before the Hon. J. C. RICHARDSON.

This is an action brought by the appellant, Mark A. Travis, against the appellee, D. H. Rhodes, to recover the statutory penalty of two hundred dollars, under sections 1065 and 1923 of the Code, for failure to enter on the margin of the record of a registered judgment the partial payments which had been made on such judgment. Geo. M. Leigh obtained a judgment in the circuit court of Conecuh county against appellant on October 10, 1890, a certificate of which was recorded in the office of the judge of probate of said county on October 23, 1893. Said judgment was transferred to appellee on February 24, 1899. After said transfer appellant made payments on said judgment to appellee, and on July 25, 1901, requested the appellee to enter the dates and amounts of such partial payments, on the margin of the registration of said judgment. Appellee failed for thirty days after said request to comply therewith, and thereupon appellant brought this suit. The amended complaint is as follows: "The plaintiff claims of defendant two hundred dollars as damages for this, whereas: heretofore, to-wit, one George M. Leigh, did, on the 10th day of October, 1890, recover a judgment against the plaintiff in this suit, in the circuit court of Conecuh county, Alabama, for the sum of \$163 and costs of suit, to-wit, \$7.30; and the said George M. Leigh, owner of said judgment, had S. S. Witherington, clerk of said circuit court of Conecuh county, on the 8th day of August, 1893, to issue a certificate of said judgment, and had the same filed for record in the office of the judge of probate of said county of Conecuh, on the 23d day of October, 1893, which certificate of said circuit clerk showed the style of the court which rendered said judgment, the amount and date thereof, the amount of the costs, the naming of the parties, and the name of plaintiff's attorneys, and the plaintiff avers that said certificate of the said circuit clerk was, on the 23d day of October, 1893, registered by the probate judge of said county of Conecuh in Book 1, on page 58 of Judgments and Decrees, the book kept

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by said probate judge for that purpose, and that on the 24th day of February, 1899, said judgment was regularly transferred to the defendant, and plaintiff avers that since said judgment was transferred to defendant he has received many partial payments on the same, to-wit; thirty-one dollars on the 2d day of May, 1899, and seventy dollars on December 31, 1900. That on the 25th day of July, 1901, the plaintiff requested of defendant, the transferee of said judgment, in writing to enter on the margin of the registration of said judgment, the dates and amounts of all such partial payments, and the source from which the same had been received, and the plaintiff avers that the defendant failed for thirty days after he received said request to enter all or any partial payment or payments of any kind on the margin of the record of said judgment, and that by reason of such failure and omission, the defendant has forfeited to the plaintiff the sum of two hundred dollars, wherefore he brings this suit." Plaintiff demurred to the amended complaint as follows: (1.) Because said complaint contains no cause of action; (2) Because said complaint fails to aver that the defendant ever caused the judgment named in said complaint or a certificate thereof to be registered in the office of the judge of probate of Conecuh county; (3) Because said complaint fails to aver that after the defendant became the owner of the judgment named therein, he had the same or a certificate of the same registered in the office of the judge of probate of Conecuh county, Alabama. (4.) Because the statutes under which this suit was brought authorizing the recovery of the penalty for failure to enter partial payments upon the margin of the record after demand in writing, are unconstitutional and void. (5). Said complaint fails to allege any facts showing that the defendant ever acquired any lien by reason of the registration of the judgment therein described in the office of the judge of probate of Conecuh county, Alabama. (6). Said complaint fails to allege that the certificate of judgment therein described contained the name of the owner of said judgment, and that the register of the

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same contained the name of the owner thereof. (7). Said complaint fails to allege that the name of the owner of the judgment therein described was set out or contained in the registration of the certificate thereof in the office of the judge of probate of Conecuh county, Alabama, at the time the same was registered. (8). Said complaint fails to allege that defendant was requested in writing to enter on the margin of the record of the certificate of said judgment therein named in the office of the judge of probate of Conecuh county, Alabama, the dates and amounts of the partial payments named therein, and the source from which the same had been received. (9). Said complaint shows on its face that the defendant never had any certificate of the judgment therein named recorded in the office of probate judge of Conecuh county. (10). Said complaint shows on its face that the registration of the certificate of judgment therein named by George M. Leigh in the office of the judge of probate of Conecuh county was void in this: that the name of the owner of the judgment did not constitute a part of said registration. (11). Said complaint fails to aver that the certificate of judgment therein named was ever transferred to defendant. (12). Said complaint fails to aver that the lien acquired by reason of the registration of the certificate of judgment therein named was ever transferred to defendant." The court sustained the demurrers. On account of the ruling of the court in sustaining said demurrers, the plaintiff declined to plead further and judgment was rendered for the defendant. The plaintiff appeals and assigns the rendition of such judgment and the ruling on the defendant's demurrers as error.

J. F. JONES and LANE & CRENSHAW, for appellant. The transferee of a judgment is within the operation of Sections 1923 and 1065, requiring that entry be made of partial payments, on record, when demanded.—*Duncan v. Ashcraft*, 121 Ala. 552.

The registration of the judgment need not be such as to create a lien, in order to render owner of judgment
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liable for failure to enter partial payments. The object of the statute is not only to relieve the debtor's property from lien, but to enable him to restore his credit.—*Livingston v. Cudd*, 121 Ala. 316; *Gay v. Rogers*, 109 Ala. 109.

POWELL & HAMILTON and W. C. CRUMPTON, *contra*. Statute is penal and must be strictly construed.—*Groom v. Hannon*, 59 Ala. 510. Unless the statute enjoins upon the appellee the duty of entering the credits he is not liable.—*Grooms v. Hannon*, *supra*.

Plaintiff must aver in his complaint facts showing a valid registration of the judgment. Complaint does not show that the name of the owner of the judgment was set out either in the certificate of the judgment or the registration of the same. Before the act of February 23, 1899, this was absolutely necessary.—*Duncan v. Ashcraft*, 121 Ala. 552.

The owner who registered the judgment, and not his subsequent assignee, is the person against whom the penalty is aimed.—*Duncan v. Ashcraft*, *supra*.

ANDERSON, J.—This was an action for the statutory penalty for failing to enter partial payment on the record of a recorded judgment, brought by the plaintiff against the assignee of the judgment, and to whom it was assigned after the filing of the certificate.

The 2d, 3d and 9th grounds of the demurrer, raise the question, that the action will lie only against the owner of the judgment who files it for record, and not an assignee who acquires it after registration and who himself never filed it at all.

Section 1920, Code 1896, provides, "That the owner of any judgment or decree may file in the office of the judge of probate a certificate of the clerk or register." Said section provides that only the owner can file it, and the defendant's contention is, that as it was filed by the then owner, that the plaintiff has no cause of action against the assignee who did not file it and was not the owner when it was filed.

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Section 1923, Code of 1896, says "Sections 1065 and 1066 of this Code are applicable to registered judgments and decrees." Section 1065 says, "A mortgagee, or the assignee or transferee of a debt secured by mortgage, who has received partial payment, if the mortgage is of record, must, on the request in writing of the mortgagor, or of a judgment creditor, or other creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, enter on the margin of the record of the mortgage the date and amount of such partial payment or payments," etc.

It will be observed that under this section the right is given to sue the assignee for the penalty, and we do not think that the law contemplated the action against an assignee only, to whom the debt was assigned before the recordation of the certificate or who in fact filed it, or that in order for one to be liable he must have refiled the certificate after he became the assignee. And as § 1923 makes said section 1065 applicable to judgments and decrees, the action will lie against the assignee of a judgment, although it had been previously filed by the original owner. The demurrers upon this ground were not well taken.

The 5th, 6th, 7th, 10th and 12th grounds of demurrer, raise the issue, that the complaint failed to aver that the certificate filed contained the name of the owner of the judgment and was therefore void as a lien, under the former ruling of this court. The law only relates as to the satisfaction of the record of the certificate and not to the judgment. The recordation of the proper certificate is what creates the lien, and when the certificate filed does not create a lien, then the defendant in the judgment cannot complain of a failure to satisfy or enter partial payments on the record of what purports to be, but what is not a lien. This court held in *Duncan v. Ashcraft*, 121 Ala. 552, that the omission of the name of the owner from the certificate rendered it insufficient to create a lien, and we think in this case, that the complaint should aver facts sufficient to show that a lien existed in order to show a cause of action, as it appears

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that the certificate was filed prior to the amendatory act of February, 1899.—Acts 1888-89, p. 60. The demurrer upon this ground was properly sustained. The 11th ground was bad. The law does not require the transfer of a certificate in order to transfer a judgment. Grounds 1 and 4 were bad, as they were general and assigned no grounds of demurrer. The 8th ground is because the complaint failed to aver that the request to enter the payments was made in writing. The complaint shows just what the demurrer avers it does not and the demurrer was bad.

Affirmed.

MCCLELLAN, C.J., TYSON and SIMPSON, J.J., concurring.

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Action by Passenger against Street Railway for Damages for Personal Injuries.

1. *Action by passenger against street railway; evidence of number of passengers on car, when admissible.*—In an action by a passenger against a street railway a count in a complaint which ascribed plaintiff's injuries to the "wanton and reckless negligence" of defendant's employees in charge of the car on which plaintiff was a passenger, in that they caused the car to approach and cross a railroad track without stopping, knowing that a train was approaching on such track and that it would probably cross defendant's track without stopping and that there would be a collision between the train and the car and that the probable result of the collision would be injury to the passengers on the car, evidence that the street car was at the time crowded with passengers, was pertinent as supporting the alleged probability and the employer's appreciation of it that passengers would be injured by the collision.

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2. *Same; when complaints of pain by injured passenger admissible.*
In an action by a passenger against a street railway for injuries caused by a collision between the car on which plaintiff was riding, and a railroad train, complaints of pain and suffering on the part of the injured passenger, made at the time the injuries were received, may be adduced as original evidence.
3. *Same; same; case at bar.*—In such a case it is competent for a physician to testify that plaintiff told him that he was hurt internally and that he had pains in his hips and was nervous.
4. *Same; plaintiff may walk before jury.*—In such a case where the evidence tended to show that the plaintiff was injured in the back and legs as a result of the collision so as to affect his ability to walk, he may be allowed to "walk the best he can" before the jury.
5. *Same; evidence of injuries to sexual organs.*—In such a case where the evidence tended to show that the plaintiff received injuries which affected his sexual organs, he may testify that he "thinks such organs are no good" to him.
6. *Same; examination of witness.*—Where an objection is sustained to a question propounded a witness and such question is afterwards answered, there is no error of which the excepting party can complain.
7. *Same; cross-examination of witness.*—Where a physician, witness for defendant, testified that he was sent by the defendant to see plaintiff after his injury, the plaintiff may bring out on cross-examination what the defendant's attorney said to him, as tending to show a bias unfavorable to defendant.
8. *Same; examination of witness.*—Where a witness was asked to state at what rate of speed the car approached the railroad crossing, his answer that "it would be hard to judge that, because it had just started and it could not have been running fast," was properly excluded, as being the witness' conclusion.
9. *Same; charge of court to jury; not error to repeat charges.*—The repetition by the court of sound and material pertinent legal propositions in charging the jury, is not error, though such repetition is effected by giving two identical charges at the request of the plaintiff.
10. *Same; when general charge properly given for plaintiff.*—Under the evidence adduced on the trial, there being but one conclusion open to the jury,—that the plaintiff was injured through the negligence of defendant's employees in bringing a car of which they had control and on which plaintiff was

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a passenger, in contact with an engine running on the bisecting track of a railroad company, the court properly gave the affirmative charge for the plaintiff.

11. *Same; same; when not error to refuse charge.*—Where the affirmative charge on the case generally was given for the plaintiff, the refusal of the court to charge in favor of defendant, on one of the counts of the complaint, if error, involved no injury to the defendant.
12. *Same; same; jury judges of damages to be awarded.*—In such a charge that “the jury are the sole judges of the damages to be awarded,” is correct.
13. *Same; same; non-recoverable items of physician's bill.*—The fact that some of the items which made up the bill rendered to plaintiff by his physician, for services, are not recoverable in this cause, does not warrant an instruction to the jury to disregard the doctor's bill.

APPEAL from City Court of Birmingham.

Tried before the Hon. WM. W. WILKERSON.

This was an action by the appellee against the appellant for damages for personal injuries received while a passenger on the defendant's street railway as a result of a collision between the car on which the plaintiff was riding and a Louisville & Nashville railroad train.

The third count of the complaint is as follows: “The plaintiff claims of the defendant the sum of ten thousand dollars as damages, for that, on and prior to the 25th day of July, 1901, the defendant was a body corporate, and was operating electric cars for the carriage of passengers for hire, in said county and State, and on to-wit: said 25th day of July, 1901, plaintiff was a passenger on one of defendant's street cars going from Woodlawn to Birmingham, there being several passengers on said car, and as the car upon which plaintiff was riding approached and reached the point where defendant's railroad crosses the track of the Louisville and Nashville Railroad Company, at or near East Birmingham (the same was not brought to a stop but) proceeded across said Louisville & Nashville railroad when a freight train of the Louisville Railroad Company moving northward collided with the car upon which the plaintiff was riding, turning the defendant's car over,

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and the plaintiff was thrown out upon the ground and one of the other passengers was thrown with great force against or upon him, and the plaintiff sustained severe injuries in his neck, stomach, back and testicles, from all of which he suffered great physical pain and mental torture, and was disabled from work, and was put to large expense in and about his cure in the way of medicines, nursing and medical attention, all to his damage ten thousand dollars as aforesaid, hence this suit. And the plaintiff avers that his said injuries were caused by the wanton and reckless negligence of the defendant's employes in charge of said car upon which plaintiff was a passenger in causing said car to approach and cross said Louisville & Nashville Railroad, without stopping, knowing that a Louisville & Nashville train was approaching the defendant's track and that it would probably cross the defendant's track without stopping, and knowing that there would probably be a collision between said Louisville & Nashville train and the car upon which plaintiff was a passenger, and that the reasonable and probable result of the collision would be an injury to the passengers on defendant's said car."

The evidence for the plaintiff tended to show that on November 1, 1901, the plaintiff was a passenger on one of the defendant's cars, in the city of Birmingham; that the car in passing through Birmingham had to cross the tracks of the Louisville & Nashville Railroad Company; that the car upon which plaintiff was riding ran into or collided with a train of said railroad company; that the car was turned over, throwing plaintiff out and someone fell on him, striking him in the stomach, and he received serious injuries to his back, spine, legs, stomach and testicles, from which he has never recovered and would not likely recover; that for a space of sixty feet before reaching the Louisville & Nashville tracks the way was unobstructed and there was nothing to prevent the motorman of the car from seeing up and down the railroad track, and that the motorman proceeded to cross the track without stopping, although a freight train was approaching at the time which collided with the car.

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The evidence for the defendant tended to show that the car upon which plaintiff was riding approached within fifteen feet of the Louisville & Nashville track and stopped; that the motorman did not see the approaching Louisville & Nashville train until after he had started up the car, and it was then too late to stop it before being struck by the train, and that the way was unobstructed for thirty feet; that plaintiff was but slightly injured.

On the direct examination of one Sheets, a witness for plaintiff, he was asked the following question: "Were there other people on the car at the time of the collision?" to which the defendant objected, the court overruled the objection and defendant excepted. The witness answered, "Yes, sir; there were a good many."

On the direct examination of the witnesses Burt, Reinhardt, Rutledge, Hurt and Wyman, they were asked by the plaintiff whether they heard him complain of being injured immediately after the collision, to which questions the defendant objected, the court overruled the objection, and defendant excepted. The witnesses answered that he complained a good deal.

On the examination of the plaintiff, he was told by his counsel "to walk the best he could before the jury." The defendant objected, the court overruled the objection and defendant excepted. Plaintiff then walked before the jury. After the plaintiff had detailed the nature and extent of his injuries he was asked the following question: "What about your sexual organs," and the witness answered, "I do not think it is any good to me." The defendant objected to this statement, the court overruled the objection and defendant excepted.

Dr. Jones, a witness for defendant, having testified that he was directed by the defendant to examine the plaintiff after the injuries were received, testified that his injuries were slight, and was asked on cross-examination to "State what Mr. Morrow (the defendant's attorney) said to you at the time he sent you to see plaintiff," to which the defendant objected, the court overruled the objection and defendant excepted. The witness answer-

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ed: "He told me to go there and see his condition, his true condition."

Upon the introduction of all the evidence the court gave the following written charges to the jury at the request of the plaintiff, to which the defendant excepted (1). "The jury are the sole judges of the damages to be awarded in this case." (2). "The court charges the jury that if they believe all the evidence in this case they will find a verdict for the plaintiff." (3). "It is left alone to the jury to say how much damages they will give to the plaintiff in this case." (4). "If the jury believe all the evidence they will find for the plaintiff."

The defendant requested the court to give the following written charges to the jury, which the court refused to give, and defendant excepted: (1). "If the jury believe the evidence they cannot find for the plaintiff under the fourth count of the complaint." (2). "If you believe the evidence you must render your verdict in favor of the defendant." (3). "If you believe the evidence you cannot find for the plaintiff under the first count of the complaint." (4). "If you believe the evidence you cannot find for the plaintiff under the second count of the complaint." (5). "I charge you that Dr. Parke and Dr. Riggs who have testified in this case were appointed by the court as a board of medical examiners to examine the plaintiff." (6). "You cannot take into consideration the doctor's bill testified to in this case in assessing plaintiff's damages."

The jury rendered a verdict in favor of the plaintiff assessing his damages at \$4,000.00. The defendant afterwards moved for a new trial on the grounds that the verdict was contrary to the weight of the evidence and was excessive and that the court erred in refusing to give the six charges requested by defendant. The court overruled the motion, and defendant appeals and assigns as error the several rulings of the court to which exceptions were reserved.

WALKER, TILLMAN, CAMPBELL & WALKER, for appellant.—The court erred in permitting the witness Sheets to testify that there were many people on the car. Clay
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case, 108 Ala. 234. The court erred in receiving evidence of plaintiff's complaints of pain. *Henderson v. W. U. T. Co.*, 99 Ala.; *Hales case*, 99 Ala. 8; *Roche v. Brooklyn City, etc. Co.*, 105 N. Y. 294, 11 N. E. Rep. Davidson case, 30 N. E. 573; *Kennedy's case*, 29 N. E. 141; *Leach's case*, 30 N. E. 163; *Pickering case*, 10 N. E. 827; *I Green. Ev.* 102. The court erred in permitting plaintiff to walk before the jury. *Meyer v. Thompson, etc. Co.*, 116 Ala. 638; *Evans v. State*, 109 Ala. 11; *Tesney v. State*, 77 Ala. 33; *Miller v. State*, 107 Ala. 40; *L. & N. R. R. Co. v. Pearson*, 97 Ala. 219; *Lincham v. State*, 113 Ala. 83. The court erred in permitting the plaintiff to testify regarding his sexual organs. *Ala. G. S. R. Co. v. Tapia*, 94 Ala. 231. The court erred in overruling the objection to the question to Dr. Jones calling for what Mr. Morrow told him. *A. G. S. R. Co. v. Hawk*, 72 Ala. 112; *Ricketts v. Birmingham Ry. Co.*, 85 Ala. 600. The repetition of charges on the subject of damages was error to the defendant. The court erred in giving the general charge for plaintiff. *London v. R. Co.*, 56 N. E. 988; *E. T. V. & G. R. Co. v. Bayliss*, 74 Ala. 161; *City Council v. Montgomery*, 72 Ala. 411. The amount of damages must find support in the evidence and the court erred in giving the charge on that subject for plaintiff. *L. & N. R. Co. v. Orr*, 91 Ala. 553. The doctor's bill should not have been considered by the jury. *Galveston R. Co. v. Thackery*, 17 S. W. 521; *San Antonio R. Co. v. Muth*, 27 S. W. 752.

JOHN T. SHUGART, FRANK S. WHITE and A. O. LANE, *contra*.—It was proper to show that there were many people on the car, as plaintiff claimed that he was hurt by a passenger falling on him. Complaints of pain made by plaintiff after the collision were admissible. Plaintiff was properly permitted to walk before the jury. 3 Am. Neg. Cases, 202; *Carrico's case*, 10 Am. Neg. Cases, 438; *S. & N. R. Co. v. McLendon*, 63 Ala. 266. The general charge was properly given for plaintiff. *Seaboard Co. v. Woodson*, 98 Ala. 378; *Seitz v. R. Co.*, 10 N. Y. Sup.; *Baker v. R. Co.*, 118 N. Y. § 18; *Feeney v. R. Co.*, 5 L. R. A. 546.

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McCLELLAN, C. J.—A count of the complaint ascribes plaintiff's injuries to the "wanton and reckless negligence" of defendant's employes in charge of the car on which plaintiff was a passenger, and goes on to allege that this wanton and reckless negligence consisted in their causing said car to approach and cross the Louisville & Nashville Railroad, without stopping, knowing that a Louisville & Nashville train was approaching defendant's track, and that it would probably cross defendant's track without stopping, and knowing that there would probably be a collision between the Louisville & Nashville train and the car upon which plaintiff was a passenger, and that the reasonable and probable result of the collision would be injury to the passengers on defendant's said car. Under this count, in our opinion, evidence that said street car was at the time crowded with passengers, or "that there were many people on the car" was pertinent as supporting the alleged probability, and the employer's appreciation of it that passengers would be injured by the collision. Was it not also competent as tending to color more darkly their alleged wantonness apart from the consideration just adverted to?

This court is committed to the proposition, and satisfied of its correctness, that in cases of this sort complaints of pain and suffering on the part of the alleged injured person may be adduced as original evidence tending to prove the existence of the condition or sensation complained of.—*Telegraph Co. v. Henderson*, 89 Ala. 510, 521; *B. U. Ry. Co. v. Hale*, 90 Ala. 8, 10-11. The testimony of plaintiff's physician: "He told me that he was hurting—hurt internally. Said he was hurting in here somewhere," like much other testimony objected to by defendant, was of this character, and so too was the testimony of Dr. Wyman that plaintiff told him he had pains in his hips and was nervous.

We, of course, cannot know precisely what figure the plaintiff cut when told by his counsel and allowed by the court against defendant's objection "to walk the best he could before the jury." It would be difficult if not impossible to reduce the result of that experiment intelli-

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gibly to paper, and no effort to that end was made. So we are not advised whether he did "his best" in the way of walking, or, to the contrary, did his best in the way of impressing the jury that his powers of locomotion had been greatly impaired. Certainly there was temptation toward the latter course; and it would seem impracticable by any sort of *cross exercise*, so to say, to test the good faith of his gait. Ethically speaking there is grave doubt whether this man's physical organism should have been exposed to this temptation and to the strain necessarily incident to yielding to it, if he did yield. But on legal principle the evidence is on the same plane as that afforded the jury by a view of his person in repose, or by having him stand before them to show that one leg is longer than the other were the shortening or elongation of a leg the thing complained of, or by exposing an arm to the jury upon invocation to do his best bending it at the joints, the claim being that it is stiffened, and therefore, incapable of normal use, and the like; and we are not prepared to say that the court erred in allowing this walking illustration of the plaintiff's alleged injuries.

Abstractly speaking the evidence, the admission of of which is challenged by the seventeenth and eighteenth assignments of error, may appear to be of an uncertain significance; but the delicacy of the subject under inquiry not only rendered proper—even commendable—the apparent indirection and vagueness of both the question and the answer, but also accounted for and relieved such vagueness and indirection to the minds of the jurors: They knew precisely what the point of inquiry was and doubtless got the precise import of the answer. It is not always necessary to call a spade a spade.

It will suffice to say that the exceptions made the basis of the nineteenth and twentieth assignments of error were emasculated—assuming, which we do not decide, that they had merit when reserved—by the subsequent testimony of the witness: The questions were in fact afterwards answered.

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The testimony of Dr. Jones as to what Mr. Morrow said to him when he sent the witness to see the plaintiff was properly admitted on the cross-examination of that witness as tending to show a bias favorable to the defendant.

The witness Howell being asked: "At what rate of speed did the electric car approach the crossing?"; replied: "Well, it would be hard to judge that, because it just had started, and it could not have been running fast." This answer was not only altogether vague, but it was potently the witness' mere conclusion of fact from another fact. It was properly excluded. The court had the right to exclude it, and that upon plaintiff's motion, even though it had been responsive to the question and the plaintiff had lost the right to have it excluded by failing to object to the question. But it was not really responsive.

We are not of opinion that the repetition by the court of a sound and pertinent legal proposition in charging the jury is error, and it is not of consequence that the repetition is effected by giving two identical charges at the request of a party.

There was but one conclusion open to the jury on the evidence in this case, viz.—that the plaintiff was injured through the negligence of defendant's employes in bringing the car of which they had control and on which plaintiff was a passenger in collision with an engine running on the bisecting track of the Louisville & Nashville Railroad Company; and the city court properly instructed them to find for the plaintiff if they believed the evidence.

The affirmative charge on the case generally having been properly given for the plaintiff, the refusal of the court to charge in favor of the defendant on one of the counts averring simple negligence—that of the conductor—if error, involved no injury to the defendant.

Charges given must be taken with reference to the evidence. It was for the jury to assess the damages in this case upon the evidence. The court's charge: "The jury are the sole judges of the damages to be awarded in

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this case," was a correct statement of the law. It was to be assumed that they would look to the evidence of injury in making their assessments. If the defendant apprehended they would be misled by the charge to go outside of the evidence, that supposed tendency should have been eliminated by requesting an explanatory charge. Or, if it appeared that they had gone outside of or beyond the evidence in their verdict the court had power to correct their action: That power was of course not surrendered, and the charge given had no reference to it. Its existence was not inconsistent with the sole duty of the jury in the first instance to assess the damages.

The fact that some items which made up the total of Dr. Hurt's bill for services, etc., rendered the plaintiff were not recoverable in this action furnished no justification for defendant's 6th request for instruction. On the whole evidence it was practicable for the jury to leave out these items and include the balance of the bill in their assessment.

We are unable to say that the trial court erred in overruling defendant's motion for a new trial.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Woodall *et al.* v. Wright *et al.*

Action against Administrator's Bondsmen for Failure to pay Decree of Chancery Court.

1. *Filing of claim against insolvent estate; applies to judgments against intestate and not to judgments against administrator.* The requirement of section 306 of the Code, that all claims against an estate which has been declared insolvent must be filed within six months from the declaration of insolvency applies to judgments rendered before such decree of insolvency against the intestate, and not to those judgments rendered against the administrator.

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2. *Declaration of insolvency as defense by administrator's sureties against judgment rendered previously to such declaration.* (Acts 1898-99, p. 85).—In an action against an administrator's bondsmen to recover a judgment against such administrator, a plea relying on the fact that the intestate's estate had been declared insolvent, since the rendition of such judgment, presents an immaterial issue.
3. *Judgment against administrator; bondsmen not estopped thereby from denying want of assets.*—The sureties on an administrator's bond are not estopped by a judgment against such administrator, in action against them to recover the amount of such judgment, from denying that the administrator had come into the possession of assets with which to discharge the indebtedness.
4. *Same; same; defective plea.*—A plea by his bondsmen which avers only that sufficient assets did not come into the possession of the administrator to pay the judgment against him, is defective.

APPEAL from Circuit Court of Marshall.

Tried before the HON. JAMES A. BILBRO.

This is an action brought by appellants, Irene Woodall and Willie Chambliss, suing by her next friend, against I. A. Wright, J. B. Manning, and Hodge Woodall as administrator of D. A. Thomas, deceased, the defendants being sureties on a bond of Robert I. Wright, as administrator of the estate of Martha E. Chambliss, said bond being in the amount of \$3,000. The complaint alleges that said bond was broken in this: "That on the 19th day of May, 1900, plaintiffs did recover a judgment in the Chancery Court of Marshall County, against the said Robert I. Wright, as such administrator, to be levied of the goods and chattles of the said decedent, Martha E. Chambliss, for the sum of forty-seven and 60-100 dollars, on which judgment, execution 'de bonis intestatis', and also execution personally against the said Robert I. Wright have been issued and return by the Sheriff, "No Property," and that the said judgment remains due and unpaid, with interest. 2. Tha' on the 19th day of May, 1900, plaintiffs did recover a judgment in the Chancery Court of Marshall County against the said Robert I. Wright, as such administrator, to be levied on the goods and chattles of said decedent, Martha E. Cham-

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bliss, for the sum of \$375, on which judgment, execution 'de bonis intestatis' and also personally against the said Robert I. Wright, have been issued and return by the Sheriff "No Property," and that said judgment remains due and unpaid with the interest." Defendant pleaded in answer to said complaint as follows: "1st. Said bond has not been broken in manner or form as in said complaint alleged." "8th. And for further answer to said complaint the said J. B. Manning avers and alleges that on the 9th day of July, 1900, the said estate of the said Martha E. Chambliss, mentioned and described in said complaint was, by the probate court of Marshall county, which court had jurisdiction of the estate of Martha E. Chambliss, was declared insolvent, and that the claim of the said Irene Woodall and Willie Chambliss, considering said decree of Chancery Court, was not filed as a claim against said estate, as required by Section 306 of the Code." "9th. And for further answer to the said complaint the said J. B. Manning pleads and says: That on the 9th day of July, in the year, 1900, the estate of the said Martha E. Chambliss, was by the Probate Court of Marshall County, Ala., which court then and there had jurisdiction of said estate, duly declared insolvent, and that by said decree of insolvency, the said Robert I. Wright was released and discharged from any and all obligation to pay said decree of the said Chancery Court, otherwise than directed and decreed by the Probate Court proceeding to settle said insolvent Estate, and the said Robert I. Wright was not bound nor obligated to, as said administrator, nor was his surety bound to pay, if he discharged said decree of the said Chancery Court, further than to see that the said Irene Woodal and Willie Chambliss had and received their distributive shares of said insolvent estate, to which they were entitled by reason of said decree of the Chancery Court of Marshall County, Alabama, mentioned and described in said complaint." "14. And for further plea, the defendants John Manning and Hodge Woodal, as the administrator of the estate of D. C. Thomas, deceased, say that the alleged breaches of the bond sued on was the failure of the defendant Robert

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I. Wright, as the administrator of the estate of Martha E. Chambliss, deceased, to pay two certain decrees rendered by the Chancery Court of Marshall County, Ala., on the 19th day of May, 1900, in favor of complainants, one for the sum of \$47.68, and the other for the sum of \$375, and costs of the suit, and these defendants deny that the said Robert I. Wright as such administrator ever came into the possession of assets of said estate with which to discharge the said decrees." Plaintiff demurred to pleas 8 and 9 on the following grounds: "1st. It is not averred that said judgments were not rendered against said Robert I. Wright in his representative capacity, but seeks to set up facts to show that one was erroneously rendered against him in his representative capacity as such administrator. Because said pleas seek to impeach the correctness and regularity of a decree of the Chancery Court; because the remedy to correct the error set up in said plea, if such error was committed, was by appeal. Because the pleas attempt to impeach collaterally a decree of the Chancery Court; because the defendant Woodall seeks to plead a personal defense of the said J. B. Manning; because it sets up a defect in the pleading of the administrator in the Chancery Court. 2nd. Because the averment that the sureties were discharged by the decree of insolvency is a conclusion. 3rd. Because it is not averred that as a decree of insolvency was rendered before the judgment averred in the complaint was rendered. 4th. Because it is not averred that there was any suggestion or plea in the Chancery Court of a declaration of insolvency, or of an insolvency proceeding pending, and is not averred that the said decrees were certified to the Probate Court by the Register. 5th. Because it seeks to set up a defect in the pleadings of the administrator in the Chancery Court. 6th. Because the decree of insolvency was rendered after the decree of the Chancery Court. 7th. Because Section 326 has no application to judgments or decrees rendered before the declaration of insolvency. 8th. Because the facts averred are no defense to the sureties in this suit." Plaintiff demurred to the 14th plea on the

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following grounds: "Because it is not averred that assets were not received with which to discharge said decrees or any part thereof. 2. It is not averred that assets were not received sufficient to pay a part of the demand." The court overruled the above demurrers to each of said separate pleas, to which ruling plaintiff separately excepted. There were verdict and judgment for defendant, issue having been joined on the pleas set out above. Plaintiff appeals, and assigns the ruling of the trial court on the above demurrers as error.

O. D. STREET, for appellant.—If the administrator suffer judgment to go against him without first obtaining a declaration of insolvency, or instituting a proceeding therefor, or without pleading such declaration of insolvency; or proceeding pending, he is forever precluded, so far as Section 306 of the Code is concerned, from making that defense.—*Reid v. Nash*, 23 Ala. 723; *McDonald v. Cox*, 104 Ala. 379; *Stern v. Collier*, 101 Ala. 424. Act 1898-9 is expressly limited to the administrator personally, and does not affect the liability of the surety. *Mount v. Stewart*, 86 Ala. 365; *Phillips v. Wade*, 66 Ala. 53. Exemption does not arise in favor of administrator until judgment has been properly certified. The statute does not expressly relieve either the administrator or his sureties from liability to suit on his bond for a failure to pay a judgment or decree against the administrator, in his representative capacity.—*Bean v. Portis*, 11 Ala. 104; *Harrison v. Harrison*, 39 Ala. 500.

The presumption of sufficient assets rising against an administrator on a judgment against him does not apply to administrator's surety.—*Banks v. Spears*, 97 Ala.

Plea 14 avers that administrator never came into possession of assets of said estate with which to discharge the said decree. This plea is bad because it did not aver that he did not receive assets sufficient to pay any part of said decrees.

J. A. LUSK, *contra*.—The funds received by the administrator are according to the averments and theory of

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plaintiffs, not funds of the estate and no action will lie against him in his representative capacity for the conversion of such funds.—*Spottswood v. Bentley*, 132 Ala. 266. One not a creditor of nor interested in the distribution of an estate cannot maintain a suit on the bond of the personal representative.—*Williams v. Stoutz*, 92 Ala. 516; *Morrow v. Wood*, 56 Ala. 1. For the taking of property belonging to a third party by an administrator, claiming in his representative capacity, when he is sued therefor, the suit is really one against him as an individual and does not bind the assets of the estate nor subject him to liability in his representative capacity. The sureties on the bond are not bound by the adjudication. 3 Mayfields Digest, 714; 11 Am. & Eng. En. p. 943; Note 66 Ala. 266.

ANDERSON, J.—This suit was brought by the plaintiffs against the defendants, as sureties on the administrator's bond of one, Robert I. Wright, who is not made a party defendant, and was based on certain judgments rendered in the chancery court against him as administrator in May, 1900. Defendants interposed, among others, pleas 8, 9 and 14, and to each of which plaintiff filed demurrers, and the ruling of the trial court in overruling said demurrers is brought here for review.

Plea 8, sets up that the estate was declared insolvent, July, 9th, 1900, which was after the rendition of the judgments, and that said claims were not filed as is required by Section 306 of the Code of 1896. The requirements of said section, that all claims must be filed within six months from the declaration of insolvency, applies to judgments rendered before such decree of insolvency against the intestate and not to those judgments rendered against an administrator.—*Ried v. Nash*, 23 Ala. 738. The demurrer to the plea should have been sustained.

Plea No. 9, sets up as a defense the declaration of insolvency subsequent to the rendition of the judgments, and relies on Acts, 1898-99, page 85, which said act is intended to relieve the administrator of any personal liability on judgments obtained before the estate is declared insolvent, after they have been properly certified from the courts where obtained. Such judgments were never binding on the sureties so as to estop them from denying

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that the administrator had come into assets with which to discharge the indebtedness, and as the administrator is not a party, the plea presents an immaterial issue. Besides, if material, it fails to aver that the judgments were certified as is required by the act and which was essential to relieve the administrator personally.

Plea 14 sets up a want of sufficient assets in the hands of the administrator to discharge the judgments. A judgment against a personal representative to enforce a debt or liability of his intestate, is not binding on the sureties on his bond, so as to preclude or estop them from denying that the administrator had come into the possession of assets with which to discharge the indebtedness. *Banks v. Speers*, 97 Ala. 560. While the sureties have a legal right to plead a want of assets, we think a plea is defective, which avers only a want of sufficient assets, and that the demurrer, for that reason, should have been sustained. For the above mentioned error the judgment is reversed.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

Hosea v. Davis, Admr.

Petition by Administrator for Sale of Lands for Payment of Debts.

1. *Decedent's estate; rights of minors.*—Where a married man at the time of his death owns other lands in this State than his homestead, and his estate has never been decreed insolvent, the rights of use and occupancy of the homestead, and the perception of rents, incomes and profits therefrom, during the life of the widow or the minority of child or children, which ever might last terminate, vest in the widow and minor children; but they take no title to the land, and in the event one of said minor children dies, said child has no title in the land which can be sold after its death pending the minority of any of the other children.

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APPEAL from the Probate Court of Clark.

Tried before the HON. JOHN M. WILSON.

The proceeding in this case was had by the appellee, L. J. Davis, as the administrator of the estate of Irene Davis, deceased, filing a petition in the Probate Court of Clark County, asking to have certain lands, specifically described therein, sold for the payment of the debts of his intestate—it being averred in the petition that the said Irene Davis was, at the time of her death, the owner of a half interest in and to said lands. The petition was contested by the appellant, Beulah Hosea, who was formerly Beulah Davis, and was a sister of the said Irene Davis. The contestant moved the court to dismiss the petition upon the ground that the estate of the said Irene Davis had no interest in said lands described in the petition. This motion was over-ruled.

Upon the trial, it was shown that J. M. Davis, the father of Irene Davis and the contestant, died on the 20th day of March, 1895, and left surviving him a widow and children. Subsequently, the widow died, and one surviving child, Irene Davis (the intestate of the petitioner), died, leaving Beulah Hosea, a surviving minor child. That at the time of the death of J. M. Davis, he owned other lands than his homestead. That the homestead had been set apart to Beulah Davis (now Beulah Hosea) as a homestead, and was occupied by her as such; and that she was at the time of the filing of the petition, a minor.

Upon the hearing of the evidence, the Court granted the relief prayed for, and ordered the property sold in accordance with the prayer of the petition. The contestant appealed, and assigned as error the over-ruling of her motion to dismiss the petition and the judgment of the Court ordering the sale of the property.

DAVIS & GREEN and W. D. DUNN, for appellant.

LACKLAND & WILSON, *contra*.—This ex-parte proceeding by Beulah Hosea for the allotment of a homestead from the lands of J. M. Davis, deceased, was also void

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because the petition was wanting in jurisdictional averments in this, to-wit: It failed to aver that the lands owned by the decedent, J. M. Davis, at the time of his death was all of the real estate owned by him, and that it did not exceed in area 160 acres and two thousand dollars in value. Said petition does not contain the necessary statutory averments sufficient to confer jurisdiction upon the Probate Court, and a decree rendered thereon was absolutely void.—*Brooks v. Johns*, 119 Ala. 412; *Chamblee et als. v. Cole*, 128 Ala. 649.

MCCLELLAN, C. J.—J. M. Davis at the time of his death owned other lands in this State than his homestead. Hence § 2071 of the Code—or rather the act of December 13th, 1892—did not operate to vest title to his homestead in his widow and minor children. His estate has never been declared insolvent. Hence title was not vested in them under § 2069. They took no title to the land, but only the rights of use, occupancy and the perception of rents, incomes and profits “during the life of the widow or the minority of the child or children, whichever might last terminate.” The widow and one of the minor children, Irene Davis, having died, these rights enured solely to the surviving minor child, Beulah Davis, now Mrs. Hosea; and were confirmed to her by the setting apart of this land as homestead exemption to her subsequent to the deaths of her mother and sister. She is entitled to hold and occupy it during her minority, not only free from the debts of her father’s estate but free also from descent, a continuation in a sense of the father’s homestead title.—*Miller v. Marx*, 55 Ala. 322, 342-3. Irene Davis therefore had at the time of her death no title to this land as a homestead, but only the right to use and occupy it during her minority. This right, of course, was cut short by her death. She had no right or title as an heir of J. M. Davis, deceased, which could be sold after her death pending the minority of Beulah Davis. Hence there was no authority in the probate court to order the sale of any interest in the land to pay the debts of her estate, while it was held by Mrs. Hosea

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as a homestead exemption. What the legal status of the land will be upon the termination of Mrs. Hosea's said homestead by her attaining the age of twenty-one years, the exigencies of this case do not require us to discuss.

The probate court erred in decreeing the sale of an undivided half interest in this land to pay the alleged debts of the estate of Irene Davis, deceased. That decree will be reversed, and a decree will be here entered denying the prayer of the petition and dismissing it out of court.

Reversed and rendered.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Cronk v. Cronk *et al.*

Bill in Equity to remove Administration of an Estate into the Chancery Court, and to require Executor to give Bond.

1. *Equity pleading; when demurrer to whole bill properly overruled.*—A demurrer to a bill in equity as a whole, is properly overruled, if for any equity disclosed in said bill, the plaintiff is entitled to relief.

APPEAL from the Chancery Court of Mobile.

Heard before the HON. THOMAS H. SMITH.

The bill in this case was filed by the appellees against the appellant. The purpose of the bill and the facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The present appeal is prosecuted from a decree of the chancellor overruling the demurrer of the defendant to the bill, as amended; and the rendition of this decree is assigned as error.

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W. J. YOUNG and BESTER, GRAY & BESTER, for appellant.—Cited *Ex. parte Kilgore*, 120 Ill. 94; *Ladd v. Ladd*, 125 Ala. 135; *Cameron v. Abbott*, 30 Ala. 416; *City Council of Montgomery v. Hughes*, 65 Ala. 203; Am. & Eng. Ency. P. & P., Vol. 22, 177 and note; *Crawford v. Creswell*, 55 Ala. 497.

FITTS & STOUTZ, *contra*.—Cited *Baker, Admr. v. Mitchell*, 109 Ala. 490; *Bromberg v. Bates*, 112 Ala. 363; *Johnson v. Clements*, (Ala.) 14 So. Rep. 14; Code 1896, Sec. 67.

TYSON, J.—The bill in this cause, as amended, was filed by complainants who are devisees under the last will and testament of their deceased mother against the respondent individually and as executor to whom letters testamentary had been duly issued by the probate court of Mobile county. Its purpose, as clearly shown, by the amendment is twofold: to remove the administration of the estate out of the probate court, to the chancery court and to require the respondent to give security for the faithful execution of the trust reposed by the will and accepted by him.

The demurrer to the bill, as amended, which was overruled, and of which complaint is here made, does not challenge or purport to challenge the sufficiency of the allegations to have the administration removed. And, for that matter, its averments in that respect could not successfully be.—*Bromberg v. Bates*, 98 Ala. 621.

Its evident purpose is to raise the question of the sufficiency of the allegation with respect to the right of complainants to require respondent to give a bond for his faithful administration of the trust. But interposed as it is to the amended bill, as a whole, and not to that phase of it indicated above, the decree appealed from must be affirmed, irrespective of whether the objections pointed out by the demurrer be good or bad.—*Houston v. Williamson*, 81 Ala. 482; *Beall & Caston v. Lehman, Durr & Co.*, 110 Ala. 446; *Worthington v. Miller*, 134 Ala. 420.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J. J., concurring.

[Robertson v. Louisville & Nashville Railroad Company.]

Robertson v. Louisville & Nashville Rail Road Company.

Action by Passenger for Failure to carry to Destination.

1. *Suit by passenger for failure to carry to destination; what sufficient complaint in.*—Where the suit is by a passenger against a common carrier, a complaint which alleges that the plaintiff purchased a ticket entitling her to transportation as a passenger, from Birmingham to Belle Ellen, and that she took passage on a train running between these points; that before reaching Yolandy, an intermediate station, she was told by the conductor or the flagman on said train, that the car in which she was then riding would not go to Belle Ellen, but would go to Brookwood, and that she must change cars at Yolandy, and a car in front of hers was pointed out by them as the car for Belle Ellen; that acting on such directions she went into the car designated by them, and as a consequence of doing so, she was left in said car on the side track at Yolandy, while the train including the car in which she had previously ridden, went on to Belle Ellen, discloses a good cause of action.
 2. *Same; what complaint need not allege.*—In such a case, the gravamen of the action being, the defendants wrong in leaving the passenger at the intermediate point, instead of carrying her to her destination, so far as the right of recovery is concerned it is immaterial whether the alleged wrongful act of the conductor or flagman was negligently, willfully, knowingly or even maliciously done, and the complaint need not use either of these terms in describing their action.
 3. *Same; what allegations proper in complaint.*—Though in such a case, the plaintiff is entitled to recover if her failure to reach her destination was caused by any act of the conductor or flagman, she may, for the purpose of fixing the amount of her damages, aver and prove that they acted maliciously, or with circumstances of aggravation.
 4. *Same; what proper defense in.*—In such case, the general issue is the only proper plea. If defendants wrong had any causal
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connection with the result complained of, it is of no consequence that the plaintiff could have avoided the result by making other inquiries as to the proper car for her to take, or anything of that sort. The plaintiff had the right to rely implicitly on what the trainmen told her in this connection, and to act accordingly, and consequently there is no room for pleas of contributory negligence.

5. *Passenger; changing cars and failing to reach destination, when carrier liable.*—Where a passenger, with a ticket entitling her to be carried between two points, embarks on a car running between these points, and before arriving at her destination, changes into another car, which though up to that time forming a part of the train on which she was then riding, is left, with her in it, at an intermediate station, and she thereby fails to reach her destination, the carrier is liable to her if the change of cars was made at the instance of, or in obedience to instructions from the conductor or flagman on the train.
6. *Same; when carrier not liable.*—In such case, if the passenger changes into the car of her own motion, and without fault or inducement on the part of the trainmen, in the mistaken belief that it, and not the car in which she had previously ridden, would go to her destination, and in consequence was left at an intermediate station, the carrier is not liable.
7. *Charge; what erroneous.*—In a suit by a passenger against a carrier for failure to carry her to her destination, when the undisputed testimony shows that she left the car in which she was riding, and went into another car, which was left on a side track at an intermediate station with her in it, and the plaintiff's testimony tends to show that both the conductor and flagman of the train on which she was riding instructed her to make the change, and the flagman testifies that he gave the plaintiff no such instructions, and had nothing to do with her changing cars, and the conductor is not examined, being dead, it is error to instruct the jury that "Unless they are reasonably satisfied that the conductor and flagman told plaintiff to get in the wrong car, and thus was left, then they must return a verdict for the defendant."
8. *Evidence; what improper.*—In such a case, the plaintiff cannot testify, whether any one was left except herself, or who was her companion on the trip, or whether such companion changed cars in the same manner as she did.
9. *Same.*—Nor, in such a case, can the plaintiff testify that a night watchman and a section foreman of defendant, who had

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nothing to do with the running of the train, saw her crying at the station where she was left, and after she had told them that she was left, did nothing to assist her.

10. *Same.*—It is not competent to prove the fact that the plaintiff was a witness in another case against the defendant, involving a charge of improper conduct against the same conductor and flagman, as independent evidence to show that they willfully or maliciously caused her to be left short of her destination.

APPEAL from Circuit Court of Bibb.

Tried before the HON. JOHN MOORE.

The appellant brought this action against the appellee, and sought to recover two thousand dollars damages for the failure of the appellee to carry her safely as a passenger from Birmingham to Belle Ellen. The complaint as originally filed contained two counts, which alleged in substance that the plaintiff, on Jan. 23rd, 1902, purchased a ticket from Birmingham to Belle Ellen, on the line of defendant's road and went on board of one of defendant's trains which ran between these points; that shortly before reaching Yolandy a station about thirty miles from Birmingham, and from which point a spur track leaves the main line for Brookwood, the plaintiff was told by the conductor in charge of the train, or by the flagman "that she was in the Brookwood coach, when she was in the Belle Ellen coach, and pointed out to the coach in front as the one for Belle Ellen, and told her to change cars at Yolandy and to go into the front car." The complaint then alleged that in obedience to these instructions the plaintiff changed cars at Yolandy, going into the car pointed out to her, which car was at that point detached from the train and left on a side track to be taken by another train to Brookwood, and that the train, leaving this car but taking the one in which plaintiff had previously ridden, went on to Belle Ellen, leaving plaintiff in ignorance of its departure, and without any means of reaching her destination, that there was no train by which she could reach her destination until the next day. The complaint then alleged that she was left at Yolandy about sun down in the evening.

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in extremely cold weather, and that there were no accommodation for travellers at Yolandy, and that she was compelled at great expense to get some one to go with her to the next station, a distance of five miles to obtain a place where she could spend the night; that she was compelled to walk this distance, carrying her infant in her arms in the cold, and was compelled to sleep in an open room without fire, and in consequence she was sick for several weeks, and suffered greatly in mind and body, "all by reason of said willful or wanton order of the said conductor or flagman as aforesaid."

The second count of the complaint is substantially the same, but concludes that the damages suffered by the plaintiff were "all consequent upon the said negligent act of the said conductor or flagman of the said train as aforesaid."

The complaint was amended by the addition of two counts, numbered three and four. The third count alleged that plaintiff bought a ticket of the defendant for transportation from Birmingham to Belle Ellen, and defendant took her aboard its train and undertook to carry her to her said destination but put her off its train at Yolandy between the termini of the route and about thirty miles from Belle Ellen near night on said day and then willfully or wantonly allowed her to remain out all night in the bitter cold with her infant baby.

The fourth count alleged that the plaintiff bought a ticket of defendant for passage on its passenger cars from Birmingham to Belle Ellen, and that the defendant took her aboard its passenger car and undertook to carry her to her said destination, but put her off at Yolandy, a point between the termini of the route, near sunset on said day and then willfully or wantonly allowed the plaintiff to remain out all night exposed to the bitter cold with her infant baby.

The first count was demurred to on the ground: 1st. Because said count charges wanton or wrongful negligence; and 2nd. Because said count attempts to charge wanton negligence and states facts showing simply negligence only.

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The demurrers were overruled by the court.

The third and fourth counts were demurred to "Because said counts fail to allege in what manner plaintiff was put off the train." "Because they fail to allege the defendant was a common carrier." "Because they fail to allege any wrongful conduct of the defendant or its servants or agents." "Because the averments fail to set up matters which constitute wanton or willful negligence."

These demurrers were sustained.

The defendant filed the plea of the general issue and six special pleas, setting up in various form that the plaintiff was guilty of contributory negligence in leaving the car in which she was riding and going into the Brookwood car, which was sidetracked at Yolandy.

The plaintiff as a witness in her own behalf testified, that on Jan. 23rd, 1902, she was in Birmingham, Ala., and on that day purchased a ticket on defendant's road to Belle Ellen and boarded one of its trains for the trip; that her ticket was taken up by the conductor before reaching Yolandy, a station about thirty miles from her destination, and from which point there was a branch line to Brookwood; that before reaching Yolandy she was told by the conductor and the flagman to be sure and change cars at that point; and that they informed her that the car in which she was then riding was the Brookwood car, and pointed out to her the car in front of her as the proper car for her to take to go to Belle Ellen; that acting on these instructions on her arrival at Yolandy, she went into the car pointed out to her and took a seat therein; that said car was set on a side track at Yolandy, and the train, including the car in which she had been riding went on to Belle Ellen without her. She testified that she did not know that the car into which she was directed was the Brookwood car until informed by a passenger therein after the balance of the train had left Yolandy going in the direction of Belle Ellen; that she got to Yolandy about sundown and stayed there about fifteen minutes and then hired Archie Black to go with her to a station about five miles distant where she spent the night; that the night was dark and ex-

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tremely cold; that she was very much distressed and was crying when she found that she had been left by her train; that she took cold that night and was sick for three weeks from it. The plaintiff was asked the following questions: "State how many passengers were in the car you were ordered out of." "Did any one of the other three passengers in that car change from that car before getting to Yolandy." "Was there any other passengers in that car going to any point between Yolandy and Belle Ellen and state whether that passenger was changed under like orders as yourself." "Was any one left at Yolandy besides your self." "Did Black get out of the other car also and go into the front car." "Did Archie Black get out of that car and go into the other car." "Was Archie Black your companion on that trip." "Did you see Archie Black get out of that car and go into the other car." "Did you see your companion Black at Yolandy." "Was Archie Black left at Yolandy." The court refused to permit any of these questions to be answered, and the plaintiff separately excepted.

On further examination, the plaintiff having testified to seeing and talking with a night watchman and a section foreman of the defendant at Yolandy on the evening she was left there, and stated that she informed them of that fact, and that she did not know where she could spend the night, and that she had her baby with her, and was crying when she talked with them, was asked the following questions: "Did the night watchman at Yolandy see you crying." "Did the night watchman at Yolandy do any thing to care for you that night." "Did you tell the section foreman of the defendant you had been left, and did he see you crying." "Did the section foreman do any thing to care for you, when you told him you had been left and he saw you crying."

The court refused to allow any of said questions to be answered, and the plaintiff separately excepted.

Plaintiff was asked: "Was not you and Archie Black summoned to Birmingham to testify against the Louisville & Nashville Railroad Company in a case where the flagman and conductor on the train at the time you was left, had been charged with misconduct in aiding a

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woman to alight from the train at Big Springs, and were you not on your way home from Birmingham where you had gone in answer to said summons at the time you were left." The court excluded the answer and the plaintiff excepted.

Archie Black, a witness for plaintiff, testified that he was a passenger on the same train with her and his destination was Big Springs which was South of Yolandy. That he was in the car with her when the conductor came through and asked her where she was going, and when told that she was going to Belle Ellen, he told her to change cars at Yolandy, that he came through several times and told her not to forget to change cars at Yolandy that in accordance with these directions she went in the forward car and took a seat; that the car was set off on a side track and the rest of the train went on in the direction of Belle Ellen. That after being left at Yolandy he and the plaintiff walked to a station about five miles in the direction of Belle Ellen; that they left Yolandy about sundown and got to the place where they spent the night about nine o'clock, that the night was dark and very cold, and that plaintiff complained of the cold both while walking there and during the night. On cross examination he testified that the conductor pointed out the car for Belle Ellen; that they went into that car and were left at Yolandy.

One Batson, a witness for the defendant, testified that he was the flagman on the train of defendant which ran between Birmingham and Belle Ellen Jan. 23rd, 1902. He described the position of each car in the train, and stated that he did not at that time know the plaintiff and did not remember seeing her on the train; that on that trip he announced in each car of the train which went to Belle Ellen and Blockton, before the train got to Yolandy that passengers for Brookwood, Mill Dale and Searls would change cars; that Yolandy was the next stop and the car for those points would be put on a switch on the left hand side of the track; that he made this announcement but once in each car. He stated that he did not speak to the plaintiff personally, and did not tell her

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to go to the front car, and did not inform her that the front car was the car for Belle Ellen, and that the conductor did not tell her to go into that car, in his presence or hearing; that he did not know the plaintiff was left and the conductor said nothing to him about any one being left on that trip.

It was shown that the conductor, Rutherford was dead at the time of the trial.

The court at the request of the defendant gave the following written charges, and to the giving of each of these charges the plaintiff separately excepted: (1.) "The court charges the jury that if they believe from the evidence that the plaintiff by her own mistake took the wrong car and was left at Yolandy without fault on the part of the defendant, then you should return a verdict for the defendant."

(2.) "The court charges the jury that unless you are reasonably satisfied that the defendant's agent or agents told plaintiff to get the wrong car, then you must return a verdict for the defendant."

(3.) "The court charges the jury that unless they are reasonably satisfied that the conductor and flagman told plaintiff to get into the wrong car, and thus was left then you must return a verdict for the defendant."

There was a judgment for the defendant, and plaintiff appeals, and assigns as error the various rulings to which exceptions were reserved.

LOGAN & VANDEGRAAFF, for appellant.—The court should have permitted the plaintiff to answer the questions asked her, they tended to show to the jury that there were other passengers aboard that car bound for points beyond Yolandy and that some of them were her companions, and were also left as was the plaintiff, they being under the same influence of the conductor and flagman. It was certainly a circumstance that the jury should look to in order to say whether or not the plaintiff acted under the order or direction of the flagman or conductor in taking the wrong car. It was competent evidence as a part of the *res gestae*.—*Mobile Ry. Co. v. Ashcraft*, 48 Ala. 15. If either the conductor or the flag-

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man told the plaintiff to get into the wrong car the company is liable and the charge requiring a verdict for the defendant unless both the conductor and the flagman directed her is clearly erroneous

ELLISON & THOMPSON, *contra*.—The evidence offered by the plaintiff as to the acts of others on the train was not competent, and the case cited by the appellant has no application, in such a case as the present. There was no situation of peril confronting the plaintiff. The court did not err in the charge given. Appellant's evidence without any conflict showed that both the conductor *and* flagman told her to get into the wrong car. No witness for the plaintiff testified that *only* the conductor or *only* the flagman told her to go in the car and her witness placed the conductor *and* the flagman together, when they told her to go there. Under this state of the evidence the charge was proper.

McCLELLAN, C. J.—It was the defendant's duty, under the averments of the first and second counts of the complaint, to carry the plaintiff from Birmingham to Belle Ellen. The averments of those counts going to show that she was a passenger on defendant's train on its schedule run from the former to the latter place, and fully entitled, as such, to be carried to Belle Ellen, were proved without conflict—in fact, admitted—on the trial. The evidence is clear in support of the conclusion that this duty would have been performed, and that the plaintiff would have been carried to Belle Ellen, but for the fact that at Yolandy, an intermediate station, whence there was a branch railway to Brookwood, she was sent out of the car, in which up to that time she had been riding, bound for Belle Ellen, into a car which, though up to that time a part of the same train, was at that point to be detached and left on a siding, to be carried in another train to Brookwood. This car was then put on the side track, and left with her in it, while the train hauling the car from which she had moved went on to Belle Ellen. If she went into this Brookwood car of her own motion, and without fault on the part of the

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trainmen, in the mistaken belief that it, and not the car in which she had previously ridden, was to go on to Belle Ellen, and in consequence was left at Yolandy, the defendant is not liable for damages sustained by her in consequence of her not being carried to Belle Ellen. But if she made this change of cars, and, as a consequence, was left at Yolandy, and suffered injuries, at the instance of the conductor or flagman of the Belle Ellen train, the defendant was liable. The complaint alleges that either the conductor or the flagman told her that the car she came from Birmingham to Yolandy in was the Brookwood car, and that the next car ahead was the Belle Ellen car, and that either the conductor or the flagman thereupon directed her to take the car ahead to be carried to Belle Ellen, and that acting upon this information, and in accordance with this direction, she went into the car ahead, and with it—it proving to be the Brookwood car—was left at Yolandy. If she proved that either the conductor or the flagman thus caused her to take the wrong car, and to be left, she was entitled to recover. The evidence for the plaintiff tended to show that both the conductor and the flagman separately and at different times gave her this information and direction. On behalf of the defendant, the flagman was examined as a witness, to the effect that he gave plaintiff no such information or direction nor had anything to do with the plaintiff's changing cars. The conductor was not examined, being dead. On this state of pleading, and proof, it was manifest error for the court to charge the jury that "unless they are reasonably satisfied that the conductor and flagman told plaintiff to get in the wrong car, and thus was left, then you must return a verdict for the defendant." Nor can it by any means be said that the charge was without injury to the plaintiff, especially in view of the fact that plaintiff's evidence as to what the conductor did was not controverted, while as to the flagman, it was directly contradicted. The jury, but for the instruction, might well have found for plaintiff on the conduct of the conductor, while not believing her evidence as to the conduct of the flagman.

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The case was unnecessarily cumbered up with additional counts and special pleas. The *gravamen* of the action is defendant's wrong in leaving plaintiff at Yolandy instead of carrying her to Belle Ellen. So far as the right to recover is concerned, it is immaterial whether the alleged wrongful act of the conductor or the flagman was negligently, inadvertantly, or mistakenly, wilfully, knowingly, or even maliciously, done; and it was not necessary for the complaint to employ any of those adverbs in characterizing the wrong. As bearing on the amount of recovery in such cases, it is competent—certainly where such is the averment—to prove that the wrong-doer acted wilfully or maliciously, or with circumstances of aggravation. And the defense in such case is simply a denial of the alleged wrong—the general issue. There is no place in such case for pleas of contributory negligence. If defendant's wrong had any causal connection with the result complained of, it is no consequence that plaintiff might have yet avoided the result by making other inquiry as to the proper car for her to take, or anything of that sort. She had a right to rely implicitly on what the trainmen told her in this connection, and to act accordingly.

As the case was developed on the evidence, the sole inquiry was whether she took the wrong car at the direction of the conductor or flagman, or of her own motion, in the mistaken belief—not induced by any fault of the trainmen—that it was the right car.

We discover no error in the rulings of the court on the admisibility of evidence. If, after the flagman had been examined as a witness, it had been proposed to show that the plaintiff was a witness in another case to prove misconduct on his part as a flagman, that fact in that connection would have been competent as tending to show his bias as a witness in this case; but we are not of opinion that the fact of plaintiff being such witness in another case, involving a charge of wrong against the conductor and the flagman, was competent here to prove that they wilfully or maliciously caused her to be marooned at Yolandy.

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What we have said will suffice for the court's guidance on another trial, and we deem it unnecessary to discuss the rulings below on this trial in detail.

Reversed and remanded.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Fulgham v. Carter.

Action of Trespass.

1. *Action of trespass; when principal liable for acts of agent.*—In an action of trespass to recover damages for the wrongful taking of mules, where it is shown that the defendant was at the time of the taking a sheriff, and that one of his deputies, according to his directions, went with an officer of the United States Army, to which the mules belonged, to locate the mules, and there was further evidence tending to show that said deputy assisted said army officer in taking the mules from the plaintiff, a charge which instructs the jury that if said deputy acted as the agent and under the instructions of the defendant in taking said mules, and said taking was wrongful, then the defendant would be guilty of a wrongful taking, asserts a correct proposition of law, and is properly given at the request of the plaintiff.
2. *Same; charge as to theft of mules.*—In such a case, the fact that the person from whom the plaintiff purchased the mules was convicted in the Federal court for stealing said mules, is not involved in any issues, and a charge in reference thereto is properly refused.
3. *Same; same.*—In such a case, a charge is properly refused as calculated to confuse the jury which instructs them as follows: "Even if the jury believe from the evidence that Jamar and Holmes were wrong in taking the property, and that the property was the property of the plaintiff, Carter, they cannot find a verdict for the plaintiff, unless the jury further believe that Jamar in taking said property was acting by the authority of Fulgham in the taking thereof."

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4. *Action of trespass admissible in evidence of statement given by defendant's deputy.*—In an action of trespass to recover damages for the wrongful taking of mules, where it is shown that at the time of the alleged taking, the defendant was sheriff of the county where the trial was had, and that in obedience to his instructions, one of his deputies went with an officer of the United States Army to which the mules belonged, for the purpose of locating said mules, and defendant's said deputy and the army officer located the mules, and took them from the plaintiff, a written statement signed by the defendant's deputy reciting that the mules were taken, and to which he affixed his signature, followed by the abbreviation "D. S." is admissible in evidence.
5. *Evidence; examination of witnesses.*—In the examination of witnesses, questions which are leading are properly refused.
6. *Action of trespass; charge of court to jury.*—In an action of trespass to recover damages for the alleged taking of several mules, a charge of the court which instructs the jury that if they believe the evidence in the case, "they will find for the defendant as to the last mule that was taken" from the plaintiff, is properly refused.

APPEAL from the Circuit Court of Marshall.

Tried before the HON. A. H. ALSTON.

This was an action of trespass, and was originally brought by the appellee, John C. Carter, against the appellants, Oscar Fulgham, J. Q. Jamar and A. D. Holmes. The defendant Holmes was not found, and therefore not served with process, and his name was stricken as party defendant.

On a former trial of the case, judgment was rendered against J. Q. Jamar and in favor of the defendant Fulgham. On an appeal from this judgment by the plaintiff the judgment in favor of Fulgham was reversed, and the cause was remained. (134 Ala. 238.)

The present appeal is prosecuted from a judgment rendered in the remandment of the cause in favor of the plaintiff, and against the defendant Fulgham.

The trial in the present case was had upon issue joined upon plea of the general issue. It was shown by the evidence that before the institution of this suit one J. Q. Jamar in company with one A. D. Holmes took from

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the plaintiff two mules; that at the time of such taking the defendant Oscar Fulgham was sheriff of Madison county, and Jamar was one of his deputies, and that A. D. Holmes was wagon-master in the Quartermaster Department in the United States Army; that a brigade of U. S. army was in camp at Huntsville, Alabama, during or after the Spanish-American war; that while so encamped there, some of the mules of the army disappeared and were stolen; that the mules so taken from the plaintiff were identified by Holmes as belonging to the army, and were on that account taken from the plaintiff. It was further shown that before going with Holmes, Jamar was handed a letter by Mr. Holmes, which was in words and figures as follows: "Mr. J. Q. Jamar: This will introduce to you Mr. A. D. Holmes who goes to Guntersville to identify the mules. You will go with Mr. Holmes and render him any service you can. Yours truly, (Signed) Oscar Fulgham, Sheriff." This letter was introduced in evidence. At the time of taking the mules, J. Q. Jamar gave to the plaintiff a statement certifying that "one J. Q. Jamar, a deputy sheriff of Madison county, State of Alabama, in company with A. D. Holmes, a wagon-master. in the Q. M. Department, U. S. A., took from J. C. Carter of Marshall county, two mules," etc. This certificate was dated Jan. 12th, 1899, and was signed "J. D. Jamar, D. S.," and also by A. D. Holmes as wagon-master. etc.

The defendant objected to the introduction of this paper in evidence, because it was irrelevant and illegal testimony, and was not shown to have been given by authority of defendant, Fulgham. The court overruled this objection, and allowed the paper to be introduced in evidence, and to this ruling the defendant duly excepted.

It was further shown that the plaintiff purchased the mules from one Giles, and that said Giles was convicted in the Federal court for stealing said mules. It was further shown by the testimony that after having been handed by A. D. Holmes, the letter addressed to him, and signed by the defendant Fulgham, J. Q. Jamar went with Holmes and located the mules in question in the pos-

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session of the plaintiff. The mules were identified and shown to have belonged to the United States Army.

During the examination of the defendant Fulgham, he testified that he was paid \$25.00 for each one of the mules that was located. Thereupon the defendant was asked by his counsel, the following question: "Was any part of this money paid for the taking of said mules?" The plaintiff objected to this question. The court sustained the objection, and to this ruling the defendant duly excepted.

Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charges: "(1.) If Jamar aided Holmes by locating and pointing out the mules for the purpose of their being taken, and the taking of the mules by Holmes was wrongful, then Jamar was a joint tort-feasor; and if Jamar acted as the agent and under the instructions of Fulgham, then Fulgham would then be equally guilty with Holmes and Jamar in a wrongful taking." "(2.) If Jamar aided Holmes by locating and pointing out the mules for the purpose of their being taken, and for which he was to receive compensation, and the taking of the mules by Holmes was wrongful, then Jamar was a joint tort-feasor. And if Jamar acted as the agent and under the instructions of Fulgham, then Fulgham would be equally guilty with Holmes and Jamar in a wrongful taking."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give, among others, each of the following written charges, requested by him: "(1.) The court charges the jury that if you believe the evidence in this case, you will find that William Giles was convicted at Huntsville, Ala., for stealing the two larger mules." "(3.) The court charges the jury that if they believe the evidence in this case they will find for the defendant as to the last mule that was taken from Mr. Carter." "(9.) Even if the jury believe from the evidence that Jamar and Holmes were wrong in taking the property, and that the property was the property of the

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plaintiff, Carter, they cannot find a verdict for the plaintiff, unless the jury believe further that Jamar in taking said property was acting by the authority of Fulgham in the taking thereof."

There were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved.

OSCAR R. HUNDLEY, and STREET & ISBELL, for appellant.—The principal is only liable for the acts of his agent, while in the line of performing the principle's business, and within the scope of his employment.—*Morier v. St. Paul etc. R. R. Co.*, 31 Minn. 351; *Gilliam v. South, etc. R. R. Co.*, 70 Ala. 268. The agent must be acting at the time for the principle, and within the scope of the business intrusted to him.—*Higgins v. The Waterflict etc. Co.*, 46 N. Y. 23; *Duggins v. Watson*, 15 Ark. 118; *Wheeler v. Boars*, 33 Fla. 696, 15 South. 584; *Johnson v. Barber*, 10 Ills. 426. As to the act itself, however, the doctrine of respondent superior, is inapplicable, and no liability therefor can attach to the principal.—*Goodloe v. M. & C. R. R. Co.*, 54 Am. St. Rep. 71-93, *note*; *Ware v. Barrataria Canal Co.*, 35 Am. Dec. 192-201; *Stephenson v. Southern Pac. R'y.*, 93 Cal. 558, 27 Am. St. Rep. 223.

JOHN A. LUSK, *contra*.—The act of the defendant and his agent in pointing out the property as distinguished from aid in taking and removing the property could make no difference, and it was proper that the Court should prevent the creation of an issue on the facts so clearly improper.—*Carter v. Fulgham*, 32 So. 685.

SIMPSON. J.—This was an action of trespass, brought by the appellee against A. D. Holmes, J. Q. Jamar and Oscar Fulgham. Holmes was not found, and a judgment having previously been rendered against Jamar he was dropped out. Several assignments of error are not insisted on in the brief of appellant's counsel, and we will take up those that are, in the order in

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his brief: (1), Charge No. 1, given on request of plaintiff, was in accordance with the instructions of this court in *Carter v. Fulgham*, 134 Ala. 238, 243.

(2). The fact that William Giles was convicted in the Federal court for stealing the mules was not an issue involved in this case, and consequently, charge No. 1, requested by the defendant was properly refused.

(3). The 9th charge requested by defendant, was calculated to confuse the jury. Jamar may have acted under the authority of Holmes, and yet have acted in accordance with instructions from Fulgham, in such a way as to make Fulgham liable.

(4). There being evidence tending to show that Jamar was the agent of Fulgham, the paper signed by Jamar was properly admitted, as a circumstance going to show by what authority he professed to act, though it was not conclusive, and was subject to explanation. Consequently there was no error in admitting it, (as claimed in the 3d assignment of error).

(5). The question mentioned in the 4th assignment of error was leading and, therefore, properly refused.

(6.) Charge 3, requested by defendant was properly refused.—*U. S. Fidelity & Guaranty Co. v. D. Habil*, 138 Ala. 351, 13th headnote.

The judgment of the court is affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

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Action to recover Damages for Loss of Team while crossing on a Ferry.

1. *Liability of owners of ferry as common carrier.*—Where a passenger on a ferry boat continues in immediate charge and custody of his wagon and team during the passage on a ferry boat and assumes to control the team during the passage across the river, the ferry owners are not liable as common carriers in Vol. 142.

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respect of the loss of his property, resulting from the team backing off into the river, but only for their negligence causing that disaster.

2. *Liability of owners of ferry; contributory negligence.*—In an action against ferry boat owners to recover damages for the loss of team backing into the river, where the issue of contributory negligence was involved, with evidence tending to support same, a charge to the jury that "If from the evidence you are reasonably satisfied that the defendant was guilty of negligence and that such negligence was the direct cause of the injuries complained of, your verdict should be for plaintiff" is improper.
3. *Same; liability to passenger transported free.*—Where no charge or compensation is made or to be made, and no compensation is to be exacted, directly or indirectly, for the transport of plaintiff's property, and this is so understood by him at the time, the ferry owners are liable to him only for the consequences of gross negligence.
4. *Same; where transportation without fee is part of contract for work.*—If the plaintiff, in action for recovery of damages for loss of team while crossing river on ferry boat, has a contract for work with the owners of the ferry boat and the customary money fee for transportation is not exacted from him in consequence of the fact that the transport was being made in carrying out a contract for work which he had with that company and the pretermision of the usual charge was in any sense a part of that contract, the attempted transport is not gratuitous and the rights of the plaintiff are the same as if regular toll had been exacted.
5. *Safe-guards of a ferry; credibility of testimony.*—Where it is shown that a ferry boat did not have a rear guard, evidence to the effect that subsequent to the accident, the ferry owners did install a rear-guard is not admissible to prove such installation as an independent abstract fact, but is competent on the cross-examination of defendants themselves after they had testified that there was no occasion for such safeguard in a properly constructed boat and that it was not customary to have such rails on other properly equipped and operated ferriboats, as going to the credibility of such testimony.

APPEAL from Circuit Court of Covington.

Tried before the HON. JOHN P. HUBBARD.

This is an action brought by the appellee, W. L. Frazier, to recover damages of appellants, G. B. Frierson and John Cooper, who were operating a ferry across the

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Conecuh river, near River Falls, in Covington county. The plaintiff drove his wagon, which was drawn by two mules, upon the flatboat of appellant, there being in the vehicle a chest of tools; after the boat had gotten under way, the mules, which had not been unhitched, became uncontrollable and backed into the river. To recover damages for such loss plaintiff sued. The evidence showed that such ferry was not equipped with a rear guard rail. Issue was joined on plea of general issue, in short by consent, with leave to introduce any matter of defense, in like manner as if specially pleaded. Plaintiff asked the witness Frazier, after he had testified that a rear guard rail was not essential to a properly guarded ferry, whether he had not seen such a rear rail on a ferry boat? To this question, and the answer thereto, defendant objected. The court overruled such objection and defendant excepted.

The plaintiff requested the court to give the following written charge: "If from the evidence you are reasonably satisfied that the defendant was guilty of negligence, and such negligence was the direct cause of the injuries complained of, your verdict should be for the plaintiff." The court gave said charge, to the giving of which charge, defendant duly excepted. The defendant requested the court to give the following written charges: (3.) "The court charges the jury that if they are reasonably satisfied from the evidence that when Frazier drove his team upon the ferry boat, he was requested by the ferryman to unhitch his mules from the wagon, and he refused to do so, retaining the dominion and control of said animals, and other property; and such refusal and retention of control directly and proximately contributed to the said loss of said property, and said loss would not have accrued except for such refusal and retention aforesaid, then they must find for the defendants, unless reasonably satisfied from the evidence that the defendants were guilty of gross negligence." (6.) "If you are reasonably satisfied from the evidence that Frazier was not to pay ferriage, then the plaintiff Frazier, is not entitled to recover." (7.) "If you are reasonably satisfied from the evidence that Frierson and Frazier

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had agreed that Frazier was to pay no ferriage, then plaintiff cannot recover." (8.) "The court charges the jury that under the evidence in this case, the defendants in operating the ferry boat in question, were not common carriers of persons and property, or either, and can not be held liable as such in this action." The court refused to give each of said charges so requested by defendant, to each of which rulings the defendant separately excepted. There were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the rulings of the trial court, to which exceptions were reserved.

STALLINGS and REID, CLAUDE RILEY and HENRY OPP, for appellant.—From the testimony, as a matter of common knowledge, the boat in question was practically like the run of ferry boats in Alabama. But for plaintiff's contributory negligence, there would have been no accident. Liability of a common carrier only applies when there is an actual bailment. In this case, defendant was only liable to use a proper degree of care to avoid consequences of plaintiff's negligence.

Charge 2 is misleading and erroneous.—*R. R. Co. v. Simpson*, 112 Ala. 426. Said charge ignores the evidence tending to show that transportation of Frazier was gratuitous.—*R. R. Co. v. Simpson*, *supra*.

Evidence that the boat was subsequently provided with a rear rail was irrelevant; it throws no light on the status of the boat at the time of the accident. To recover, plaintiff had to show gross negligence on the part of defendant, defendant having shown contributory negligence on the part of the plaintiff.

POWELL & ALBRITTON, *contra*.—The owner of a ferry boat is bound to provide all things necessary for the maintenance of a ferry in an efficient state and safe condition. The cause of the accident was failure of defendant to have a rear guard rail on said ferry. Plaintiff did nothing to frighten the mules. The testimony without conflict shows defendants were guilty of negligence

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and that the affirmative charge could have been given for plaintiff.

MCCLELLAN, C. J.—The evidence showed beyond controversy that Frazier, the plaintiff, continued in immediate charge and custody of his wagon and team on the ferry boat and assumed to control the team during the passage across the river. The ferry owners were not therefore liable to him as common carriers in respect to the loss of his property resulting from the team backing off into the river, but only for their negligence causing that disaster.

There was evidence adduced showing that the boat was not provided with a guard rail across the rear end to prevent just such occurrences as that which transpired in this instance and that such provision would have prevented this occurrence, and there was evidence tending to show that the omission of that safeguard was negligence on the part of the defendants. Upon this without more, charge 2 requested and given for plaintiff could have been properly given. But there was more. The issue of contributory negligence was in the case. The evidence afforded ground for a conclusion by the jury that the plaintiff was himself guilty of negligence in failing to unhitch the team from the wagon upon entering on the passage in compliance with the warning and request of the boatman, and that this negligence proximately contributed to the loss he sustained. So finding it was not only the jury's right but their duty to return a verdict for the defendants notwithstanding their negligence in not having a rear guard rail in place and the causal connection of that negligence with the result complained. This charge 2 took that right from the jury and prevented their performing this duty, and required them to find for plaintiff upon proof of causal negligence on the part of defendants even though they should also find that plaintiff was negligent and that his want of due care contributed to their injury. The charge was therefore affirmative error. It remained in the case and was before the jury as a declaration of law by the court throughout their deliberations. It was not merely mis-

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leading, but, when referred to the evidence, as all charges must be, was positively erroneous, and was not corrected by the charge given at defendant's request which was inconsistent with it. We cannot affirm that the giving of this inconsistent instruction rendered the error of the original charge innocuous.

If no charge was made or to be made and no compensation was to be exacted directly or indirectly for the transport of plaintiff's property, and this was so understood by him at the time, the defendants were liable to him only for the consequences of gross negligence—not liable at all unless the jury found that the provision of a guard rail at the rear end of the boat was so plainly a duty imposed on the ferryman that no man of ordinary care and prudence would have pretermitted its performance. But if the defendants, the owners of the ferry, also constituted the Horse Shoe Lumber Company, and the customary money fee for ferriage was not exacted from the plaintiff in consequence of the fact that the transport was being made in carrying out a contract for work which he had with that company, and the pretermision of the usual charge was in any sense a part of that contract, the attempted transport cannot be said to have been gratuitous; but the rights of the plaintiff would be the same as if regular toll had been taken of him.

We are of opinion that evidence to the effect that subsequently to the loss of plaintiff's property defendants did install a rear end guard rail on this boat was inadmissible to prove that as an independent, abstract fact; but that such evidence was competent on the cross-examination of the defendants themselves after they had testified that there was no occasion for such safeguard in a properly constructed boat, and that it was not customary to have such rails on other properly equipped and operated ferry boats, as going to the credibility of such testimony.

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What we have said will sufficiently advise the circuit court of our views for all the purposes of another trial; and we will not discuss the assignments of error separately.

Reversed and remanded.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Action to recover Damages for Personal Injuries.

1. *Action for negligence; sufficiency of complaint.*—In an action to recover damages for personal injuries, alleged to have been sustained by reason of the plaintiff's vehicle being run into by one of the defendant's cars, a count of the complaint which avers that the "defendant negligently caused or allowed said train to run upon or against said vehicle or animal, as aforesaid, whereby plaintiff suffered said injuries and damages, as aforesaid," states a substantial cause of action.
2. *Same; same.*—In such a case a count of the complaint states a substantial cause of action which, after averring that the defendant's train at the time of the accident, was being run in violation of a city ordinance then avers, said violation of said ordinance consisted in this, viz., Defendant caused, permitted or suffered said locomotive engine to run within the limits of said city at a greater rate of speed than four miles per hour when running back-wards; defendant caused, permitted or suffered said train to run or move in the night time without having a head-light; defendant caused, permitted or suffered said train to run without causing the usual signals to be given continuously by ringing the bell or otherwise.
3. *Trial and its incidents; charges of court to jury.*—Where the court gives its charges to the jury orally, and the defendant reserves no exception to any part of the charge, and after having so instructed the jury, the court refuses to give a written charge requested by the defendant, but subsequently upon the consent of the plaintiff gives said charge, but refuses the request of the defendant to so modify the oral charge as to

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harmonize with the charge so given, such refusal of the court will not work a reversal of the cause.

4. *Action for negligence; what necessary to recover.*—In an action against a railroad company where a count of the complaint is in trespass involving the affirmative participation of the defendant in causing the injury, and there is no evidence that the defendant directly participated in the negligence complained of in the manner as stated, the defendant is entitled to the general affirmative charge in its favor as to said counts.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This action was brought by the appellee, James Gerganous, against the Birmingham Belt Railroad Company to recover damages for personal injuries. The complaint contained three counts, which were in words and figures as follows: "First count. The plaintiff claims of the defendant two thousand dollars as damages, for that, heretofore, to-wit, on the 19th day of July, 1901, defendant was operating a certain train upon a railway, which train was composed of a steam locomotive engine and certain cars, and said railway ran along or across a public highway in the city of Birmingham, Jefferson county, Alabama, and was on grade with same, that on said day while plaintiff was in a vehicle to which a team was attached, and was upon said public highway, in said city, said train ran upon or against said vehicle, or one of the animals composing said team, and as a proximate consequence thereof plaintiff was thrown or caused to fall or jump from said vehicle, his back was injured and sprained, his side was cut and bruised, he was injured internally, was shocked and otherwise injured in his person, was made sore and sick, suffered great mental and physical pain, his health and physical staminus were greatly and permanently impaired, he was rendered for a long time, less able to work and earn money, was rendered permanently less able to work and earn money, plaintiff's vehicle was greatly injured or destroyed, plaintiff's said team was greatly injured and their value lessened, and plaintiff's harness was greatly injured or destroyed, and plaintiff was put to great trouble, inconvenience and expense for medicine, medical attention,

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care and nursing, in or about his efforts to heal and cure said wounds and injuries.

Plaintiff alleges that defendant negligently caused or allowed said train to run up or against said vehicle or animal, as aforesaid, whereby plaintiff suffered said injuries and damages as aforesaid.

"Second count. Plaintiff refers to and adopts all the words and figures of the first count from the beginning thereof, to and including the words "heal and cure his said wounds and injuries," where they first occur together in said count.

Plaintiff further avers that defendant wantonly and intentionally caused or allowed said train to run upon or against said vehicle or animal, as aforesaid, and inflict upon plaintiff the injuries and damage aforesaid.

"Third count. Plaintiff refers to and adopts all the words and figures of the first count from the beginning thereof, to and including the words "heal and cure the said wounds and injuries," where they first occur together in said count.

Plaintiff further avers that said train run upon or against said vehicle or animal, as aforesaid, and plaintiff suffered said injuries and damage as a proximate consequence of the violation by defendant of Section 466 of the city code of Birmingham, which is as follows: Sec. 466. Speed—Headlight—Signals.—Any person who causes, permits or suffers any locomotive engine to run within the city limits at a greater rate of speed than eight miles per hour when running forward, or four miles per hour when running backwards, or who causes, permits or suffers any locomotive engine or train to run or move in the night time without a headlight, or who shall cause, permit or suffer any locomotive or train to run at any time without causing the usual signals to be given continuously, by ringing the bell or otherwise, must, upon conviction, be fined not less than one nor more than one hundred dollars." "Said violation of said ordinance consisted in this, viz: Defendant caused, permitted or suffered said locomotive engine to run within the limits of said city at a greater rate of speed than four miles per hour, when running backwards; defendant caused, per-

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mitted or suffered said train to run or move in the night time without having a headlight; defendant caused, permitted or suffered said train to run without causing the usual signals to be given continuously by ringing the bell or otherwise." All to plaintiff's damage ten thousand dollars, wherefore he sues."

To the 1st and 3d counts of the complaint the defendant demurred upon the following ground: "1. It is not shown by said count what duty defendant owed the plaintiff. 2. It is not shown by said count that the defendant neglected any duty to the plaintiff which caused or contributed to cause the injury complained of. 3. The facts alleged in said count do not show any negligence for which the defendant is liable or chargeable. 4. It is not alleged or shown in said count that the plaintiff was on or near said railway for any lawful or necessary purpose. 6. It is not alleged or shown by said count that the defendant inflicted the injuries complained of wilfully or wantonly. 7. No sufficient facts are stated in said count to show that the plaintiff was injured by reason of the wanton or wilful negligence of the defendant, its agents or servants. 8. The facts are not so stated in said count that the defendant can take issue thereon.

And the defendant demurs to the third count of the complaint and assigns each of the grounds heretofore assigned to the first count, and the following additional grounds: 9. It is not alleged or shown how or in what manner the injury to the plaintiff was caused by or resulted from the rapid rate of speed at which said locomotive was run; the absence of a headlight; the failure to ring the bell or give other signals. 10. It is not alleged or shown that the defendant, its agents or servants, knew or had reason to believe that the failure to ring the bell or blow the whistle or give other signals, the absence of a headlight or running the train backwards at a greater rate than four miles an hour would inevitably or probably result in injury to the plaintiff or any one else." These demurrers were overruled.

Under the opinion on the present appeal it is unnecessary to set out the facts in detail.

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The defense requested, among other charges, the general affirmative charge in its favor as to the second count of the complaint, and duly and separately excepted to the court's refusal to give said charge as asked.

The seventh assignment of error is in the following language: "The said city court erred in refusing to grant defendant's request that the oral charge delivered to the jury by the court be modified so as to conform to the certain written charge which plaintiff's counsel had consented should be given and read to the jury." In order to understand the question which is sought to be raised by this assignment of error it will be necessary to state what took place on the trial, as shown by the bill of exceptions. The following facts are disclosed by the bill of exceptions:

The court charged the jury orally in respect to the burden of proof as follows: "The law says that when a person is injured in a collision at a crossing in a city by a train of cars that the burden of proof is on the railroad company to acquit itself of negligence. Now, gentlemen of the jury, when an accident happens at a crossing in a city—collision at a crossing in a city—the law presumes that the defendant was guilty of negligence, and the burden is on the defendant to show that it was not negligent. If it shows that it was not, then of course, it is not liable for the injury. It is a pure accident. Railroad companies have a right to go across streets just as much as pedestrians or persons in vehicles have a right to go across the street, and because a person is injured at a crossing, it is not necessarily the case that the railroad company is liable for it. If the railroad company does everything it is required to do, and exercised all reasonable care it could do, and nevertheless the injury happens without anybody's fault, the law says the railroad company is not liable in damages to the person injured. So, gentlemen of the jury, the burden of proof is on the railroad company to show that it did everything that it ought to have done in running its train over 19th street, and if it shows that it was not guilty of simple negligence, the plaintiff would have no right to recover."

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The defendant requested the court in writing to give to the jury the following charge: "I charge you that the burden of proof is upon the plaintiff to reasonably satisfy you by the evidence that the defendant was guilty of negligence, as charged in some count of the complaint, and if from all the evidence you are not reasonably satisfied of the truth of the averments of negligence as alleged in the complaint, then you must find a verdict for the defendant without regard to the question of contributory negligence."

The plaintiff's counsel consented that the written charge just above set out was the law of the case, and consented that it should be given to the jury. When the plaintiff's counsel assented that the written charge just above set out should be given to the jury, the defendant's counsel then requested the court to modify or change the oral charge in respect to the burden of proof so as to make the oral charge conform to the proposition of law asserted in the written charge which plaintiff's counsel had consented was the law of the case. The court refused to grant that request and the defendant thereupon excepted.

There was verdict and judgment for the plaintiff, assessing his damages at \$2,000.00.

The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved.

WALKER, TILLMAN, CAMPBELL & MORROW, for appellant.—Section 3328 of the Code confers the right upon either party to move for charges in writing. This is one of the methods which the law-makers have seen fit to adopt for the purpose of raising questions of law, and in construing that section of the Code the court held that written charges are to be taken in connection with the oral charge, that the charges which are given must be read to the jury, and that it is error to disallow the jury to take written charges with them upon their retirement. *Home Protect. of N. A. v. Whidden*, 103 Ala. 203; *Martin v. Scott*, 104 Ala. 71; *A. C. S. R. R. v. Arnold*, 80 Ala. 600; *Müller v. Hampden*, 37 Ala. 342.

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The second count was in trespass, and there was no evidence proving the averments of the complaint. For this reason the defendant was entitled to the general affirmative charge, as requested.—*City Delivery Co. v. Henry*, 34 Sou. Rep. 389; *Southern Ry. Co. v. Yancey*, 37 Sou. Rep. (MS.); *Birmingham Sou. R. R. Co. v. Gunn*, 37 Sou. Rep. (MS.); *Central of Ga. R. R. Co. v. Freeman*, 37 Sou. Rep. (MS.).

BOWMAN, HARSH & BEDDOW, *contra*.—Cited *L. & N. R. R. Co. v. Woods*, 105 Ala. 568; *Central of Ga. Ry. Co. v. Foshee*, 125 Ala. 226; *Postal Cable Tel. Co. v. Jones*, 133 Ala. 225; *Central of Ga. Ry. Co. v. Freeman*, 134 Ala. 354; *Rhode Fur. Co. v. Wheeden*, 108 Ala. 252; *Tobias & Co. v. Triest & Co.*, 103 Ala. 664; *State v. Habb*, 29 Sou. Rep. 725; *Nablin v. State*, 100 Ala. 13; *L. & N. R. R. Co. v. Bissell*, 30 Sou. Rep. 778.

ANDERSON, J.—The first assignment of error in this case is based upon the ruling of the trial court, in overruling the demurrers to counts 1 and 3 of the complaint. The demurrers were without merit and were properly overruled.

When the court charges the jury orally and the defendant reserves no exception to any part of the charge, he cannot subsequently complain of same. Nor has it the right to complain that the court gave one of its written charges, even if previously refused and then gave it by the consent of the plaintiff, simply because it did not thoroughly harmonize with the oral charge, and the refusal of the court to modify the oral charge will not work a reversal. If the trial court erred in the oral charge, the defendant could have protected itself by excepting thereto, and failing to do so cannot now claim that it was hurtful. The written charge having been given at the request of the defendant, it cannot complain because the trial court granted the request, and as the oral charge was not excepted to, its correctness is assumed and the refusal of the court to modify same, was not error.

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The second or wanton count of the complaint, is in trespass, not case, and involves the affirmative participation of the defendant in causing the injury. There was no evidence that this defendant ran or directed the running of the train in the manner complained of, and as the defendant requested the affirmative charge as to this count, it should have been given.—*City Delivery Co. v. Henry*, 139 Ala. 161; *Central of Ga. Ry. Co. v. Freeman*, (Ala.) 37 So. Rep. 387.

The ruling of the trial court upon the evidence was free from reversible error.

Reversed and remanded.

MCCLELLAN, C.J., TYSON and SIMPSON, J.J., concurring.

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Petition for Mandamus.

1. *Constitutional law; act repealing the county court of Clay county unconstitutional.*—The act approved September 18th, 1903, the purpose of which was to repeal an act establishing the county court of Clay county of law and equity jurisprudence, and several other acts relating to said county court (Local Acts 1903, p. 255), is unconstitutional and void, for the reason that the notice of intention to apply for the passage of such repealing act did not state the substance of the bill which was introduced and purported to be passed by the Legislature.

APPEAL from the Circuit Court of Clay.

Heard before the Hon. JOHN PELHAM.

The proceedings in this case were had upon a petition filed by the appellant, J. W. Hooten, addressed to the judge of the circuit court of Clay county, praying that a writ of *mandamus* be issued to R. W. Mellon, as clerk of the county court of Clay county, commanding him to file the summons and complaint in said county court.

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The facts disclosed were as follows: By an act of the legislature of 1903, entitled "An act to repeal an act entitled 'An act to establish a county court for the county of Clay,' approved December 13, 1898, and all subsequent and amendatory acts relating to *said court*, and to transfer all the civil cases at law and criminal cases therein pending, together with all the dockets, papers and books relating to said cases in said county court of Clay to the circuit court of Clay county, Alabama, and to transfer all the cases now pending upon the equity side of the dockets of said court, together with all the dockets, papers and books of every kind whatsoever, to the court of chancery of the county of Clay,"—said above county court of Clay, of which R. W. Mellon was clerk, was sought to be repealed.—Acts of 1903, p. 255.

The notice published of the introduction in the legislature of said act of repeal was as follows:

"Notice."

"Notice is hereby given that a bill will be introduced in the present legislature of Alabama to repeal a certain act, "To establish a county court for the county of Clay," approved December 13, 1898, and to provide for the transfer of all cases pending in said county court of Clay at the time of its repeal to another court of competent jurisdiction.

Also to repeal an act "To amend sections eleven and eighteen of an act entitled an act to establish a county court for the county of Clay, approved December 13th, 1898, and to add sections 33½ thereto," approved March 2, 1901.

Also to repeal an act "To abolish the county court of Clay county organized under the general statutes of Alabama, and to confer the power and jurisdiction of said abolished court upon the county court of Clay county recently established by this legislature for said county of Clay, and to provide for the transfer of all cases pending in said abolished court to the new court so established," approved February 1, 1899.

Also, to repeal an act "To further regulate the practice and procedure of the circuit court of Clay county," approved December 13, 1898."

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Sections 1, 2, 3, 4 of the repealing act respectively attempts to repeal said four acts, the titles to which are enumerated in the foregoing notice.

The remaining sections of the said repealing act seek not only to transfer cases pending in the repealed court to the circuit and chancery courts respectively, but also vest authority in the clerk of the circuit court and registry in chancery respectively, as to the collection of all accrued costs and to do and to perform all acts and discharge all duties in regard to said records, dockets, papers, transferred from the county court attempted to be repealed.

After the passage of said repealing act, J. W. Hooten as plaintiff, sought to file in said county court with the clerk thereof, the case of J. W. Hooten, Plaintiff v. Hill, Defendant. Upon said R. W. Mellon refusing to file said cause in said county court, the petition in the present case was filed by J. W. Hooten, the plaintiff in said cause, asking for a writ of *mandamus*. Upon the hearing the judge of the circuit court refused to issue the writ of *mandamus* prayed for. From this judgment, refusing to issue said writ, the present appeal is prosecuted, and the rendition thereof is assigned as error.

KNOX, DIXON & BURR, BROWNE, McELDERRY & HARRISON and E. J. GARRISON, for appellant.—The repealing act is a local law, and the notice of the intention to apply therefore should be given, and this notice should state the substance of the proposed law.—Constitution 1901, § 106. The notice as given in this case did not comply with this statutory provision.—*Lancaster v. Gafford*, 139 Ala. 372; *Wallace v. Board of Revenue*, 37 So. Rep. 323.

C. C. WHITSON, *contra*.—The affidavit and proof of notice in this case shows that the notice of the introduction of the repealing act appeared once a week for four consecutive weeks in a newspaper published at Ashland, in Clay county, Alabama.

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Everything that the Constitution required to give validity to this act was complied with.—*Kumpe v. Irvin*, 36 So. Rep. 1024; *State ex rel Crow v. Crook*, 123 Ala. 657.

MCCLELLAN, C. J.—We are of opinion that the act of September 18, 1903, the purpose of which was to repeal an act establishing a county court in Clay county of law and equity jurisdiction, and several other acts relating to said county court, was not constitutionally enacted for that the notice of intention to apply therefor did not state the substance of the bill which was introduced and nominally passed by the legislature. Some of the judges are of opinion that the statement in the notice of the purpose to provide in said act for the transfer of cases pending in said county court “to another court of competent jurisdiction” did not cover the provisions in the act whereby equity cases are transferred to *another* court, viz: the chancery court, and cases at law therein pending are transferred to yet another court, the circuit court of the county. A majority of the court, however, do not concur in this view, but do concur in the proposition that such notice does not cover that provision in the act whereby in effect *jurisdiction* is conferred on the circuit court to try misdemeanors on information in the first instance, and such cases pending in said county court are transferred—not to a court of existing competent jurisdiction—but to the circuit court. These considerations lead to the conclusion that the county court of Clay as established by the act of December 13, 1898, is still in existence, and that petitioner Hooten is entitled to the writ of *mandamus* prayed to compel Mellon, the clerk of said court, to file the complaint which he tendered, to issue summons thereon, etc., etc. The judgment of the circuit court denying *mandamus* must therefore be reversed. The cause will be remanded.

Reversed and remanded.

HARALSON, TYSON, ANDERSON and DENSON, J.J., concurring.

DOWDELL and SIMPSON, J.J., dissenting.

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Action to recover Damages for Personal Injury.

1. *Wanton, wilful or intentional negligence; insufficiency of evidence to support count charging same.*—In an action against a railroad company, the affirmative charge should be given against a count, charging wanton, willful or intentional negligence, where the only evidence tending to support same was that the whistle was not sounded nor the bell rung, as the train approached the crossing near which plaintiff was injured.
2. *Trespass upon railroad track; when child incapable, by reason of tender age, of exercising discretion, may commit.*—A child incapable, by reason of tender age, from exercising discretion may become a trespasser upon the same facts that would impress that character upon a person of legal discretion, and this is true, although the child would be incapable of contributory negligence.
3. *Same; same; case at bar.*—Where a little child nineteen months old came on the track at the crossing, and, seeing the train, turned up the track, went several feet away from the crossing, stopped and stood gazing at the approaching engine, she became a trespass on the railroad company's track.
4. *Same; duty of railroad company.*—A railroad company owes no duty to a trespasser upon its track other than to resort to all reasonable means to avoid injuring such trespasser after its servants become aware of the trespasser's presence and peril.
5. *Failure to give statutory signal at railroad crossing; effect in case of injury to trespasser.*—Where a little child in the act of crossing a railroad track, on the approach of an engine, which had failed to give the statutory signal, turned up the track, approached the engine and thereby became a trespasser, the railroad company is liable for injuries sustained if it be shown that the child would not have entered upon the crossing had the signal been given.
6. *Same; same.*—Where it is shown that the trespasser would not have heeded the signals if given, failure to give same does not render a railroad company liable for injuries to such trespasser.

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APPEAL from the Circuit Court of Marshall.

Tried before the Hon. J. A. BILBRO.

This was an action brought by the appellee, Annie Belle Harris, suing by her next friend, George T. Harris, against the appellant, The Nashville, Chattanooga & St. Louis Railway Company, for damages for personal injuries sustained by appellee. The evidence showed that the plaintiff, who was a little child nineteen months old, was struck by an engine, belonging to plaintiff, at or near a railroad crossing. There were only two eyewitnesses to the accident, the engineer and the fireman. They testified that they saw the child when about one hundred and fifty yards from the crossing; that she came on the crossing and then proceeded up the track ten or twelve feet towards the engine, and then stopped. The train was going about eighteen miles an hour when the child was discovered, and about two miles an hour when she was struck. There was evidence tending to show that the statutory requirement to ring the bell or blow the whistle at the crossing was not complied with. The engineer and fireman testified that as soon as the child was discovered the track was sanded, brakes applied, the engine reversed, and everything in their power done to stop the engine.

The first count of the complaint, as amended, sought to recover, for the "wanton, reckless or intentional negligence" of the engineer, "who, while operating, managing, and controlling said engine on said road, with reckless, unwarranted and dangerous speed, did wantonly and recklessly strike and run over plaintiff at a road crossing on said railroad." The second count, as amended, averred, in substance, that the plaintiff, who was a child of tender age, incapable of exercising judgment, after having gone upon defendant's track "for the purpose of crossing over or going beyond defendant's railroad at a public crossing," was struck and injured by the locomotive, the negligence complained being the failure to ring the bell or blow the whistle at the crossing. The third count averred that the negligence consisted in the failure of the engineer to "use all means within his power, known to skillful engineers, to stop the train

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after the discovery of the plaintiff upon the railroad"; the fourth, that the negligence consisted in "failure to keep a proper lookout on approaching the place where the plaintiff was injured"; the fifth, that it consisted in "the failure to have proper brakes and appliances for stopping the train." The sixth count is a rehearsal of the statements of negligence of the other counts, stating them in the alternative. Defendant demurred to the first count on the ground that same "joined an action for simple negligence with an action for wanton negligence"; that it sought to recover punitive damages when it did not present a case of wanton, willful or intentional negligence; and that it failed to show wherein the speed of the train was reckless. The defendant demurred to the other five counts on the ground that they did not show a cause of action, and because complaint averred that plaintiff was a child incapable of exercising judgment and discretion, and further averred that said child entered upon the railway for the purpose of crossing said track. Defendant also filed separate demurrers to each count. The court overruled defendant's demurrers, and issue was joined on the plea of the general issue and the statute of limitations of one year. Defendant requested the affirmative charge as to each count, which was overruled by the court, except as to the fifth count.

There were verdict and judgment for the plaintiff, assessing her damages at \$1,000. The defendant appeals and assigns as error the several rulings of the trial court as to the pleadings and the evidence, to which exceptions were reserved.

OSCAR R. HUNDLEY, for appellant.—Where a count avers wanton negligence and the facts set out show only simple negligence, the count is demurrable.—*M. & C. R. R. Co. v. Martin*, 117 Ala. 367. One standing upon a railroad track, and not crossing it, is a trespasser. *Glass v. M. & C. R. R. Co.*, 94 Ala. 587. The statute requiring ringing of bell or blowing of whistle at crossings is not for benefit of trespassers.

If the engineer did all in his power known to skillful engineers to stop the train as soon as he saw the tres-

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passer, he is not guilty of wanton negligence.—*L. & N. R. R. Co. v. Gentry*, 103 Ala. 635.

MCCORD & McCORD and J. A. LUSK, *contra*.—An infant under six years of age is not capable of contributory negligence.—*Bay Shore R. R. Co. v. Harris*, 67 Ala. 6. If the operator of the train approaching the crossing, saw the child under circumstances rendering it probable that it would go on the track, failure to so operate the train as to enable them to stop in the event, would not be less than wanton.—*A. G. S. R. R. Co. v. Burgess*, 119 Ala. 555.

McCLELLAN, C. J.—We deem it unnecessary to consider whether the first count of the complaint sufficiently charges willful, wantonness, or the like, since, assuming that it does, we are of opinion that no evidence was adduced on the trial tending to prove such charge. The only eye-witnesses to the occurrence were the fireman and the engineer. They each testified that as soon as the child was seen by them or either of them approaching the track, the track was sanded, the brakes were applied and the engine was reversed—that, in short, everything possible to be done to stop the train before it reached the point where the child came upon the track was promptly done. The speed of the train considered with reference to the place of the accident afforded no basis for an inference of willful, wanton, or reckless misconduct on the part of the engineer. Even if the declaration which the witness Hooper testified the engineer, Lane, made in his presence to the effect that he saw the little child when he was two or three hundred yards away from it, but thought it was a goat, be regarded as evidence in the case for any other purpose than the impeachment of the testimony of Lane given on the trial—which it is not (1 Greenleaf on Evidence, § 461f), it has no legitimate tendency to show that Lane willfully ran against the child, or acted wantonly toward it, or was recklessly indifferent to its safety. There was some evidence tending to show that the whistle was not sounded nor the bell rung as the engine approached the crossing,

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but this imported nothing beyond simple negligence on the part of the enginemen: standing alone it afforded no predicate for an inference of willfulness or wantonness on their part. The affirmative charge requested by the defendant, against the first count should have been given.

All the evidence goes to show that the little child—a toddling baby nineteen months old—came on the track at the crossing and, seeing the train, turned up the track and after going several feet away from the crossing, stopped and stood looking at the approaching engine. Probably so far as she was capable of intention, the child's purpose when it came onto the track was to cross over and beyond it along the road, and it was open to the jury to so find in line with the averment of the complaint in this connection. But her subsequent course made her a trespasser on defendant's track—none the less so by reason of her tender age, for though she could not be charged with contributory negligence, she may be a trespasser upon the same facts that would impress that character upon a person of legal discretion—and being a trespasser the defendant, from the time she became one, owed her no duty other than to resort to all reasonable means to avoid injuring her after it, i. e., its servants, became aware of her presence and peril. The evidence without conflict showed that this duty was performed by the enginemen; that they did all that was possible to do to stop the engine before striking her.

There was a tendency of the evidence, as we have seen, to show that the statutory signals for the crossing were not given. If there was any room on the evidence for the jury to find that she would not have come upon the crossing had these signals been given, the injury might be ascribed to their negligent pretermission. The jury might have concluded that she was injured in consequence of the failure to give these signals and found against the defendant on that ground, though satisfied that the trainmen were not at fault after she came on the track. But it is not our opinion that there was any thing in the evidence to justify such conclusion. To the contrary, the evidence shows affirmatively that the child

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had not the least appreciation of the danger of going on the track, that her knowledge of the approach of the train, assuming even that she was capable of such knowledge, made no impression of danger whatever upon her—after seeing she walked toward it, and then stopped, gazing at it from a position in the middle of the track—and a finding that she would have heeded the warning of the crossing signals, had they been sounded, and kept off the track, is not only unwarranted by the evidence, but would be distinctly opposed to every manifestation the circumstances afforded. To say the least, such a conclusion would be pure speculation and conjecture unsupported by any evidence. Hence our further conclusion that the affirmative charge requested against those counts of the complaint which charged negligence on the part of the defendant's servants, should have been given: *The injury is not shown to have resulted from the only negligence of which there is any evidence.*

We deem it unnecessary to discuss other rulings presented by the record.

Reversed and remanded.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Forcible Entry and Detainer.

1. *Color of title; when deed admissible as.*—In an action of forcible entry and detainer, the plaintiff after offering evidence, that it was, prior to the entry of the defendant on the lands in controversy, in the actual possession of another portion of the lands described in a deed which also conveyed the lands in dispute, may introduce the deed in evidence as color of title.
 2. *Same; possession under, to what extends.*—Mere color of title does not draw possession to one who is not in, or does not take, actual possession of some part of the land conveyed;
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but *possessio pedis* of any part of the land conveyed, in law, is held to be actual possession of the entire tract.

3. *Same; possession under, requisites of.*—Possession which will entitle a plaintiff in an action of forcible entry and detainer, to recover must be such title that if continued for the necessary period would vest him with the legal title as against the true owner, if there were an outstanding title; and actual possession of part of the premises embraced in a deed, if accompanied by disclaimer of title and possession and ownership as to a part not actually occupied, does not extend possession under the deed to the portion as to which there is a disclaimer.
4. *Evidence; what admissible in forcible entry and detainer.*—Where in a suit of forcible entry and detainer, the question is one of actual possession and the plaintiff a corporation is relying upon adverse possession, any declaration, by an authorized agent, made for it and in its behalf tending to show that it did not claim the land, is admissible in evidence against it.
5. *General charge; when improper.*—Where the plaintiff in a forcible entry and detainer suit, in order to establish possession of the part of land in dispute, shows actual possession of another part of said land conveyed by a deed, and there is evidence tending to show that while holding actual possession under the deed of part of the land conveyed, there was a disclaimer of ownership and title as to the part in dispute, the general charge in favor of plaintiff should not be given, but it should be left to the jury to decide whether plaintiff had possession of the disputed lands.

APPEAL from the Circuit Court of Baldwin.

Tried before the Hon. WM. S. ANDERSON.

This was an action of forcible entry and detainer, brought by the Blacksher Company, a corporation, against the appellant.

During the trial of the case, the defendant offered in evidence a deed from Leatherbury & Patterson, conveying the lands involved in the suit to Caroline Bailey, which deed was dated March 5th, 1901, and also a deed from Blacksher Company to D. D. Hall, giving a quit claim to the lands involved in this suit, together with other lands. To the introduction of each of these deeds in evidence, the plaintiff separately objected. The court sustained each of these separate objections, and to each of these rulings the defendant separately excepted. The

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other facts of the case are sufficiently stated in the opinion. From a judgment in favor of the plaintiff the defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

ERVIN & MCALEER, LESLIE HALL, C. J. TORREY and F. S. STONE, for appellant.—We are aware that a deed is admissible for the purpose of showing the boundaries of the land, but this deed was offered “as color of title,” and for that purpose it was inadmissible. In order for possession of a part to constitute possession of the whole, there must be not only “absence of a hostile possession” in some other party, but one of two other things must be shown; first that the grantor in the deed had possession of the piece in dispute, so that his deed would pass such possession, or second, such grantor must have had the title so that the deed would pass his constructive possession.—*Turnley v. Hannah*, 82 Ala. 143; *Barefoot v. Wall*, 108 Ala. 328; *Farley v. Bay Shell Road Co.*, 125 Ala. 197.

With the evidence showing the admissions of the officers of the Blacksher Company in, the court should not have given the affirmative charge.—*Knowles v. Ogletree*, 96 Ala. 557.

STEVENS & LYONS, *contra*.—Occupancy of any portion of the land under color of title is *actual* possession of the entire body described in the instrument which constitutes the color of title.—*Stovall v. Fowler*, 72 Ala. 78; *Black v. T. C. & I. Co.*, 93 Ala. 111.

The alleged disclaimer of ownership by the officers of the company could not affect the possession of the company and that was what was in issue in this case.

TYSON, J.—The complaint, after amendment, contains four counts. The first three count upon a forcible entry and detainer, and the last upon an unlawful detainer.

The plaintiff, if entitled to recover, must do so upon the counts declaring on a forcible entry and detainer,

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since the testimony fails to show that defendant's entry was by its consent.

On the trial the plaintiff, a corporation, admitted to be the legal successor of the Dixie Mill Company, after offering evidence that it was, prior to the entry of defendant on the lands in controversy, in the actual possession of another portion of lands described in a deed executed by one Ferguson to its Dixie Mill Company, which also purported to convey the land, was permitted to introduce in evidence, against the objection of defendant, that deed as color of title. In this ruling there was no error.

As said in *Cunningham v. Green*, 3 Ala. 130, "The plaintiff must have proved *a possession*, either actual, by having the land under his immediate control and dominion; or constructive, by being in possession of a part of the tract, under color of title for the whole."—*Turnley v. Hanna*, 82 Ala. 139; *Bohannon v. State*, 73 Ala. 47; *Stovall v. Fowler*, 72 Ala. 77; *Black v. Tenn. Coal, Iron & R. R. Co.*, 93 Ala. 109, 111.

In the case last cited it is said: "Mere color of title does not draw possession to one who is not in or does not take actual possession of some part of the land conveyed; but '*possessio pedis*' of any part of the tract conveyed, in law, is held to be the actual possession of the entire tract. It is not constructive possession, strictly speaking, but actual possession, that a party has under color of title of the premises conveyed. Technically speaking, in legal contemplation, there is no such thing as constructive possession under color of title."

In *Stovall v. Fowler*, *supra*, it was expressly declared that, when there is an entry on land under color of title by deed, in legal contemplation, there is "actual possession to the extent of the boundaries contained in the writing, and this, though the title conveyed is good for nothing." Of course, the deed in this character of action cannot be looked to for the purpose of determining whether the plaintiff acquired a title to the land in controversy. To permit this to be done would violate Section 2135 of the Code, which prohibits the estate or merits of the title to be enquired into. But as we have

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said, it was clearly competent evidence, as color of title, to show the extent of plaintiff's possession claimed to the premises in controversy.—*Turnley v. Hanna, supra*. And we think the record sufficiently discloses the limitation upon its operation to this purpose. However, to entitle the plaintiff to recover, the testimony must establish such an actual possession to the land in controversy, as that if continued for the necessary period, the possession would vest in him a legal title to it against the true owner, if there was such outstanding title to it. *O'Donohue v. Holmes*, 107 Ala. 489. This, of course, involves the issue of fact as to whether or not, plaintiff claimed the land in controversy, notwithstanding it was embraced in the deed. Although it may be named in the deed, yet if plaintiff did not claim to be the owner of it, clearly its actual possession of another portion of the tract described in the deed, under the principle announced, cannot be extended to this land.

In order to establish its claim of ownership to this land, the plaintiff, independent of the deed, offered testimony tending to prove this fact. However, in order to contradict this, the defendant introduced in evidence certain conversations had with the president of the plaintiff corporation and its superintendent with reference to a sale of this piece of land, which if believed by the jury, would have authorized them to construe what was said by each of these officers as disclaiming on the part of the plaintiff any interest in or claim to it. Of course, if the title had been in controversy and the plaintiff was not relying upon adverse possession to sustain its right of recovery, no declaration made by its officers to the effect that it did not own or claim to own the land would or could deprive it of a title acquired by a conveyance. But the question here under consideration is one of actual possession and relying, as the plaintiff must do, upon an adverse possession any declaration, by an authorized agent, made for and in its behalf, tending to show that it did not claim the land, is evidence against it, upon the issue under discussion which the defendant was entitled to have the jury pass upon.

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We are, therefore, of the opinion that the case should have been submitted to the jury, and that the affirmative charge given at plaintiff's request was error.

The deeds offered in evidence by defendant were properly excluded.—*Cunningham v. Green, supra.*

Reversed and remanded.

McCLELLAN, C. J., SIMPSON and ANDERSON, J. J., concurring.

O'Bryan Bros. v. Webb *et al.*

Action against Sheriff on his Official Bond.

1. *Sheriff; duty and liability after levy of attachment.*—While it is the duty of a sheriff, who has the custody of property under the levy of an attachment, to preserve it and keep it safely, he is not an insurer of the property against fire; and it is incumbent upon him only to use that reasonable care and diligence in keeping such property, which a man of ordinary discretion and judgment might reasonably be expected to use in reference to his own property; and if while in the exercise of such care, the property is destroyed by fire, while in his custody, the sheriff is not liable for a breach of his official bond.
2. *Sheriff; breach of official bond; sufficiency of complaint.*—In an action against a sheriff and the sureties on his official bond to recover damages for the breach of such bond by the sheriff's failure to execute a writ of *venditioni exponas*, it is necessary that the complaint should aver that the failure to execute such writ was wrongful, negligent, and the like; and in the absence of such averment the complaint is subject to demurrer.

APPEAL from the Circuit Court of Cherokee.

Tried before the HON. J. A. BILBRO.

This action was brought on Feb. 27th, 1902, by the appellants against the appellee, James M. Webb, a sheriff of Cherokee county, and a surety on his official bond, and sought to recover for Webb's failure to execute a writ of

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venditiona exponas and thereby collect money upon a judgment which the plaintiffs had recovered in an attachment suit against one J. E. Abernethy. The complaint as originally filed contained two counts.

In the first count of the complaint, the plaintiff claimed damages for the breach of the official bond of Webb, which was alleged to have been executed by him, and the other defendant as surety, for the faithful performance by Webb of the duties required by him by law as sheriff of Cherokee County. It was then averred in the complaint that the conditions of this bond had been broken in that said Webb had not faithfully performed the duties of the office; that on Jan. 21st, a writ of *venditioni exponas* was issued in an attachment suit by the complainants against one Abernethy, directing said defendant Webb to sell the stock of goods of said Abernethy upon which he had levied an attachment, and which stock of goods was in possession of said sheriff, by virtue of the levy of said writ of attachment; that the plaintiffs recovered a judgment in said attachment suit against Abernethy on Jan. 20, 1902; that said writ of *venditioni exponas* was placed in the hands of said Webb as such sheriff on Jan. 21th, 1902; "and that he has wholly failed to execute the same by a sale of said property as required by the mandate of said writ, by reason of which failure plaintiffs' said judgment remains wholly unsatisfied, to the damage of the plaintiffs as above stated."

The second count of the complaint in setting out the prerogatory averments averred the failure of Webb complained of in the following words: "That said James M. Webb failed to secure the said property as levied on that the same might be sold to satisfy plaintiffs' said judgment, and by reason of such failure the said property, on, to-wit, the 1st day of February, 1902, while still in his possession under said writ of attachment, became wholly destroyed, whereby plaintiffs' said lien of attachment became of no avail, and their said judgment wholly unsatisfied, to the damage of the plaintiff, as aforesaid."

The defendants demurred to the first and second counts of the complaint upon the following grounds: "(1). It

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alleges the failure on the part of the said sheriff to sell the property named in said count without showing that such sale could have been effected by the exercise of due diligence on the part of said sheriff." (2). Said count does not aver that the failure on the part of said sheriff to sell the property referred to in said count, or to make the money on said process was due to any neglect or omission of duty on the part of said sheriff."

This demurrer was sustained, and thereupon the plaintiffs amended their complaint. The trial was had upon plea joined upon the plea of general issue to the amended complaint.

It was shown by the evidence that the plaintiffs instituted an attachment suit against one J. E. Abernethy; that the writ of attachment issued in said suit was levied upon stock of merchandise of said Abernethy and said merchandise was thereby taken in possession of the defendant Webb as sheriff of Cherokee county; that subsequent to the levy, the plaintiff recovered a judgment in said suit against Abernethy on Jan. 20th, 1902; and upon the recovery of this judgment, a writ of *venditioni exponas* was issued, and placed in the hands of the sheriff on Jan. 21st, 1902; that while said writ was in the hands of the sheriff, and before he had sold the goods thereunder, to-wit, on the night of Feb. 1st, 1902, the goods levied on under the attachment were destroyed by fire.

The defendant Webb as a witness testified that he advertised the goods for sale the next day after the writ of *venditioni exponas* was received in his office. That the sale was to be held on the 3rd day of February, 1902, and that the goods were burned on the night of Feb. 1st, 1902. There was other evidence introduced on the part of the defendant tending to show that after the levy of the attachment, the storehouse in which the goods were was locked and fastened up, and that the sheriff and his deputy went to the storehouse from time to time to see that he goods were alright. The plaintiffs requested the court to give to the jury the general affirmative charge in their behalf, and duly excepted to the court's refusal to give said charge. The plaintiffs separately excepted

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to the court's giving at the request of the defendants the following written charges: (2.) "If the jury believe from the evidence that the goods were not burned in consequence of any neglect of duty on the part of the sheriff, then your verdict must be for the defendant." (3.) "If the jury believe from the evidence that the sheriff exercised such diligence in keeping the goods as an ordinary prudent man would employ about his own goods, then he cannot be liable in this case." (5.) "If the jury believe from the evidence that the sheriff exercised such diligence as an ordinary prudent man employs about his own property, he is not liable in this case whether the property was burned or stolen." (8.) "The court charges the jury that it is not true under the evidence that the goods were left in the possession of J. E. Abernathy, but the evidence if believed shows that they were left in the building of the father of J. E. Abernathy."

There were verdict and judgment for the defendant. The plaintiffs appeal and assign as error the rulings of the court in sustaining the demurrers to the original complaint, and the several rulings of the trial court to which exceptions were reserved.

MATTHEWS & WHITESIDE and COOKE & COOKE for appellants. The sheriff had the right to employ some one to remove the goods to a safe place, or to employ some one to guard them, and our insistence is that his failure in this case to do so was gross negligence. *Kahn, et al. v. Locke*, 75 Ala. 334; *Smith v. Huddleston*, 103 Ala. 227.

Whenever property in the hands of a sheriff or constable is purloined or otherwise escapes from custody, the resulting loss must be borne by some one. It is at least, as must that this loss should fall upon the officer, whose duty it was to protect the property, as that it should fall upon the plaintiff or defendant, neither of whom has the authority to afford such protection."—2 Freeman on Execution, (2d Ed.) § 270; Croker on Sheriffs, § § 439 and 836; 22nd A. & E. Ency. of Law, (1st Ed.) pp. 549, 550; *Price v. Stone*, 49 Ala. 544 & 550; also 73 Am. Dec. 731; 84 Am. Dec. 464; *Dorman v. Kane*, 5 Allen 38; *Starr v.*

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Moore, 3 McLean 354; Drake on Attachment, (4th Ed.) Sec. 294.

BURNETT, HOOD & MURPHREE, *contra*.—The charges given at the request of the defendant were exact statements of the law as enunciated by the court.—*Price v. Stone*, 49 Ala. 543; *Patton v. Haum*, 28 Ala. 618; 25 Am. & Eng. Ency. Law, (2 Ed.) p. 712.

McCLELLAN, C. J.—Action by O'Bryan Brothers against Webb, sheriff, and the sureties on his official bond. O'Bryan Brothers were plaintiffs in action to recover money against one Abernathy, in which attachment was levied on stock of goods, and plaintiffs had judgment with order for sale of attached property; the sheriff failed to execute said *renditioni exponas* and to make plaintiff's recover thereon, and for that failure this suit is brought. The defense was that the property attached was destroyed by fire prior to the advertised day of sale without fault of the officer.

The sheriff having the custody of the property under the levy of the attachment, it was his duty to preserve it and keep it safely, but his duty was not an absolute one. He was not an insurer of the property against fire, or other adventitious destruction or loss; but it was incumbent upon him only to use reasonable care and diligence in keeping it, the care which a man "of ordinary discretion and judgment might reasonably be expected to use in reference to his own property;" and he and his sureties are liable only for a loss which has resulted from a failure on his part to use that degree of care.—*Price v. Stone*, 49 Ala. 543, 551; 25 Am. & Eng. Ency. Law, p. p. 712, 713.

On the evidence in this case, it cannot be affirmed as matter of law that the sheriff failed to exercise the degree of care required of him in the conservation of this property. Whether he did or not was a question for the jury, and it was properly submitted to the jury in the charges given at defendant's request.

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The remaining exceptions reserved to the court's ruling on the competency of evidence, which are insisted upon in appellant's brief, are without merit.

The circuit court did not err in sustaining demurrers to the original counts of the complaint. They should have averred that the sheriff's failure to execute the *venditioni exponas* was wrongful, negligent or the like, especially as it appeared by them that the order was made only a little over a month before the suit was instituted. Evidence that the sheriff had had reasonable time to make the sale and had failed would, *prima facie*, support such averment of wrongful or negligent failure, leaving the burden on defendants to bring forward special facts in refutation of it.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Trial of the Right of Property.

1. *Title; husband and wife.*—When there is a controversy as to whether property belongs to the husband or to the wife, the possession of the husband is not adverse to the wife, and such possession is not evidence of the husband's title.
2. *Same; same; repetition of charges.*—A charge setting forth above principle, is not a mere repetition of a charge that "the possession of the husband is the possession of the wife when the title to the property is shown to be in the wife," as said last quoted charge ignores the consideration that the husband's possession is not evidence against the wife's title.

APPEAL from Jackson Circuit Court.

Tried before the HON. J. A. BILBRO.

This was a claim suit between Mary Anglin, claimant, and Leonard Thomas, plaintiff. Attachment had been issued, on bond and affidavit by Thomas, and levied upon

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certain property, which Thomas alleged belonged to Z. T. Anglin for \$40.59 and costs, and on the trial of Mary Anglin's claim in the Justice Court, neither the defendant nor the claimant appearing, there was judgment for the plaintiff. The case was carried to the circuit court on a writ of *certiorari*. There was conflict in the evidence as to the ownership of the property levied upon, which was in possession of the husband and wife, living together as such. The jury found for the plaintiff, and that the property was that of the husband, the defendant, and liable to plaintiff's attachment.

On the trial of the cause, claimant requested the following charge: "When there is a controversy as to whether property belongs to the husband or wife, the possession of the husband is not adverse to the wife and such possession is not evidence of the husband's title." The court refused to give said charge, which refusal the appellant assigns as error.

J. E. BROWN, for appellant.—There can be no title by adverse possession, between the husband and wife, while residing together, in that relation.—*Larkin v. Baty*, 111 Ala. 303; *Stiff v. Cobb*, 126 Ala. 381; *Allen v. Hamilton*, 109 Ala. 634; *Bragg v. Massey*, 38 Ala. 89; *Newbrick v. Dugan*, 61 Ala. 251; *Gifford v. Strauss*, 89 Ala. 283.

VIRGIL BOULDIN, *contra*.—Possession is an act of ownership, and when coupled with evidence tending to show the husband acquired the property in his own right, in the first instance, possession may be looked to, in connection with evidence, on question of title. Jury was authorized to consider defendant's possession and the character of his dominion over the property, when the wife seeks to hold it against a creditor of the husband.—*Arnold v. Cofer*, 135 Ala. 364.

ANDERSON, J.—This was a claim suit between Mary Anglin, claimant and Leonard Thomas, plaintiff, growing out of the interposition of a claim to property levied on as the property of her husband, the defendant. There

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was conflict in the evidence as to the ownership of the property levied upon, which was in possession of the husband and wife living together as such. The jury found for the plaintiff, and that the property was that of the husband, the defendant, and liable to plaintiff's attachment.

There are several assignments of error, but all seem to have been abandoned in the brief of claimant's counsel, save the refusal of the court to give the following charge: "When there is a controversy as to whether property belongs to the husband or wife, the possession of the husband is not adverse to the wife and such possession is not evidence of the husband's title."

When two persons are jointly in possession of property, the legal title being in only one of them, the law relates the possession to the title, and when a husband and wife living together have a community of possession of property, the legal title to which is in the wife, possession of such property will be referred to the title.—*Larkin v. Baty*, 111 Ala. 303.

We cannot, therefore, see, when there is a community of possession, as in this case, that the possession of the husband would be adverse to the wife's title or evidence against the same, and for that reason said charge should have been given.

Charges given at the request of claimant, doubtless put in the bill of exceptions to show us that the refused charge had been substantially given are considered. We are not unmindful of the rule that it should not work a reversal of the case when refused charges are but well repetitions of those given, even if not in the same language.—*Smith v. State*, 92 Ala. 30.

Charge 1, which is as follows, "The possession of the husband is the possession of the wife when the title to the property is shown to be in the wife," is the only one that bears any similarity to the one in question and we do not see how it covers the salient features of the refused charge. This given charge ignores the considera-

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tion of the husband's possession as not being evidence against the wife's title.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

Edwards *et al.* v. Edwards.

Petition for a Tenant in Common for the Sale of Lands and Division.

1. *Trust estate; creation, continuance and termination of trust.*

Where lands are conveyed to a certain named person as trustee for the use, benefit and behoof of his wife and her children, and in special trust for the said wife and her children or issue "to live, dwell or inhabit thereon and therein, and for the support and maintenance of" the said wife, and "for the support, maintenance, protection and education of said children or issue," and there is conferred upon the trustee the power to sell the corpus of the estate in certain contingencies for reinvestment, to the same uses, upon the death of the wife who was the trustee and mother, the trust terminates, and the full legal title, freed from such trust, unites with the legal title in the children vesting in them an absolute fee simple title in the property conveyed.

2. *Petition by co-tenant for sale of lands for division should aver petitioner's interest.*—Where a tenant in common files a petition to have the property jointly owned sold for division upon the grounds that it cannot be equitably divided, the petition should set out the interest of the petitioner in said lands, and should pray a distribution of such interest of the proceeds to the petitioner.

3. *Same; where minors are interested, guardians ad litem should be appointed.*—In a proceeding to sell lands owned by tenants in common for division, where some of the co-tenants are minors, it is error for the court to render a decree without having the infant defendants represented by a guardian ad litem.

4. *Petition for sale of lands for division; when depositions of witnesses should be suppressed.*—In a proceeding to sell lands

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owned jointly for division among the co-tenants, upon the ground that the same cannot be equitably divided, where there is no notice of the filing of interrogatories given as required by the statute' (Code §§ 732, 733, 3181) the depositions taken upon such interrogatories should be suppressed.

APPEAL from the Probate Court of Autauga.

Tried before the HON. GEORGE S. LIVINGSTON.

The proceedings in this case were had upon a petition filed in the Probate Court of Autauga county, by the appellee, A. H. Edwards.

It was averred in the amended petition "that A. H. Edwards, the petitioner, was a resident citizen of Autauga county, and was over the age of 21 years; that Holman Edwards, Mary Edwards, Sallie Edwards and Mrs. B. F. Small were the heirs at law of Dr. Charles A. Edwards;" that Dr. Charles A. Edwards died on June 10th, 1900, and that on Dec. 21st, 1889, the above named Holman Edwards died, leaving surviving him three children, viz: Eugene Edwards, Marie Edwards and the petitioner, A. H. Edwards; that on the 11th day of September, 1865, Daniel Pratt conveyed to the said Charles A. Edwards in trust for the use and benefit of Mrs. Agnes P. Edwards, wife of the said Charles A. Edwards, and the children of the said Agnes P. Edwards, by the said Charles A. Edwards, which said children were Holman Edwards, Sallie Edwards, Mary Edwards and Mrs. B. F. Small, certain parcels or lots of land specifically described, lying in and being situated in the town of Prattville, county of Autauga and State of Alabama; that the petitioner, A. H. Edwards and Eugene Edwards and Marie Edwards are the children of Holman Edwards, deceased, and they, together with Sallie Edwards, Marie Edwards and Mrs. B. F. Small are the joint owners of the lots of land specifically described in the complaint, "that the above mentioned lots of land cannot be equitably divided among the several joint owners of the same;" that Sallie Edwards, Mary Edwards and Mrs. B. F. Small are all over the age of twenty-one years. The prayer of the petition was as follows: "Therefore your

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petitioner prays that your honor will grant a decree of sale of the said lots, for a division thereof among the several joint owners as follows: a one-fourth interest to Miss Mary Edwards, a one-fourth interest to Miss Sallie Edwards, and a one-fourth interest to Mrs. B. F. Small, all of whom now reside at Chappell Hill, in the State of Texas, and a one-fourth interest to petitioner, A. H. Edwards, Eugene Edwards and Marie Edwards jointly, who reside at Prattville, Alabama."

To the amended petition, the respondents demurred upon the following grounds: 1. That it was shown that the property sought to be sold was conveyed to Dr. Charles A. Edwards in trust, and that the probate court had not jurisdiction to entertain the petition and decree for the sale of said lands. 2. Said petition fails to show what interest the parties to said suit and each of them hold or own in said lands. 3. Said petition fails to disclose what interest, if any, the petitioner A. H. Edwards owned in said lands at the time of the filing of the petition. 4. Said petition fails to show what interest, if any, said Holman Edwards, deceased, held in said lands during his lifetime. 5. Said petition shows that said Holman Edwards had no interest in said lands in his lifetime. 6. The age of Eugene Edwards and Marie Edwards are not set out in the petition. This demurrer was overruled. The respondents filed an answer to the petition in which they admitted the averments thereof, except the averments as to the children of Holman Edwards owning an interest in said lands, which facts they denied in their said answer. They attached to their said answer the deed executed by Daniel Pratt and wife to said Charles A. Edwards, conveying the property described in the petition. After granting and conveying said lands which were described in said deed, the said deed then proceeds in its habendum clause, as follows: "That the said Charles A. Edwards is to hold the above mentioned and described premises as trustee, and they shall be held for the use, benefit and behoof of Mrs. Agnes P. Edwards, wife of said Charles A. Edwards, and the children by the said Charles A. Edwards and as trustee for

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them and in special trust for the said Agnes P. Edwards and her said children or issue, to live, dwell and inhabit thereon and therein, and for the support and maintenance of the said Agnes P. Edwards, and for the support, maintenance, protection and education of the said children or issue. The above mentioned and described premises are to be held only as trustee of the said Agnes P. Edwards and the said children or issue by the said Charles A. Edwards, and are not in any event whatever to be subject to the past, present or future liabilities, debts or obligations, either legal or equitable, of the said Chas. A. Edwards. And whenever the interest and convenience of the said Agnes P. Edwards and her said children or issue, require, demand or justify a sale of the aforesaid premises, then the said trustee, Chas. A. Edwards, is authorized and empowered to sell and convey the same to the highest bidder, either at public or private sale, for cash or on a credit, as he, said trustee, may think best and advisable, and invest the purchase money for the same as soon as collected in some other and suitable real estate, which real estate when so purchased, is to be held by said trustee as the aforescribed premises, and subject to the same trusts, and for the same purposes." The petitioner propounded interrogatories. The first sentence of interrogatories was as follows: "Interrogatories to be propounded to J. L. Alexander and J. T. Floyd, in the above entitled cause"; which sentence was then followed by several interrogatories. At the end of said interrogatories, it was suggested that H. E. Gipson be appointed commissioner. These interrogatories were filed on March 28, 1902. On the same day, to-wit, March 28th, 1902, a commission was issued to H. E. Gipson. In the commission issued by G. S. Livingston, judge of probate of Autauga county, to H. E. Gipson, it was sated that he was appointed "as commissioner to take the answers to the interrogatories hereunto attached of J. L. Alexander and H. J. May, material witnesses for the plaintiff," in said cause. There was no notice given to respondents of the filing of said interrogatories, and there were no cross interrogatories

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propounded. The depositions of these witnesses as returned by the commissioner set out at length the answers of the said J. L. Alexander to the several interrogatories propounded, which answers were signed by Alexander. Immediately following the deposition of H. J. May, which after stating his name, age and residence in answer to the first interrogatories, then proceeds as follows: "On hearing the other deposition of J. L. Alexander read over, H. J. May subscribed his name to the same and adopts them as his deposition to the same interrogatories." There then follows the signature of H. J. May. It was shown by the deposition of J. L. Alexander that Mrs. Agnes P. Edwards, the wife of Dr. C. A. Edwards, was dead at the time of the filing of the petition; and the witness Alexander further testified that the property which was jointly owned by the parties to the suit could not be equitably divided.

There was appointed no guardian *ad litem* for Eugene Edwards and Marie Edwards, who were minors.

Before entering upon the trial of the cause, the respondents moved the court to suppress the depositions of the witness J. L. Alexander and H. J. May taken in behalf of this cause upon the following grounds: 1. Because said depositions were not taken as in chancery cases. 2. The interrogatories propounded by the witnesses were filed in the office of the judge of probate of Autauga county, Alabama, on the 28th day of March, 1902, and a commission to take the depositions thereon was issued on the same day. 3. Said cause was not at issue when said interrogatories were filed and commission was issued to take said depositions. 4. The defendant nor any of them, nor their attorneys or solicitors were served with notice for ten days of the filing of the interrogatories. 5. Copies of said interrogatories were not served upon the opposite parties or their attorneys. 6. The place or places of residence of the witnesses was not given, nor was affidavit made that same was unknown. 7. The interrogatories filed in the court were for the purpose of taking the testimony of J. L. Alexander and J. T. Floyd, as witnesses, whereas a commission

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was issued to take the deposition of J. L. Alexander and H. J. May. 8. Because the witness H. J. May did not answer the interrogatories propounded to him. 9. Because the deposition of H. J. May was not taken.

The court overruled the motion to suppress the depositions, and from this ruling the defendant duly excepted. The depositions were introduced in evidence, and the copy of the deed from Daniel Pratt and wife to Dr. Charles A. Edwards was also introduced in evidence. Upon the introduction of all the evidence the court rendered a decree granting the prayer of the petitioner, and ordering the property sold. From this decree the respondents appeal, and assign as error the overruling of their demurrers to the petition, the rendition of the decree and the other rulings of the trial court to which exceptions were reserved.

GRAHAM & STEINER, for appellant.—It is the settled law of this State that where an estate “is one merely in trust, the probate court has no jurisdiction to order a sale of it for distribution.”—*Rice v. Drennen*, 75 Ala. p. 338; *Wimberly v. Wimberly*, 38 Ala. 40, and authorities therein cited; *Crenshaw v. Crenshaw*, 127 Ala. 208.

The trust involved in this case is an active trust, and therefore the title to the property sought to be sold is held in trust and consequently the probate court is without jurisdiction in the premises.—1 Perry on Trusts (5th ed.) par. 18; *Simmons v. Richardson*, 107 Ala. 697; *Robinson v. Pierce*, 118 Ala. 273; *Huntington v. Spear*, 131 Ala. 414.

A trust, such as created by the Pratt deed, cannot be terminated except by operation of law, by its limitations or by act of the parties.—27 Am. & Eng. Ency. of Law (1st ed.) 309; see also *Whitlow v. Echols*, 78 Ala. 206; *Foster v. Ballantine*, 126 Ala. 393; *Wharton v. Moragne*, 62 Ala. 201.

The guardian *ad litem* for the infant defendants should have been appointed.—Code, § 3180. The depositions should have been suppressed, because they were not taken

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as in chancery cases.—Rule 50 Chanc. Pro. Code, §§ 71, 732 and 3180.

GUY RICE, *contra*.—The court had jurisdiction of this cause.—Code 1896, § 3161; *Wilkinson v. Stewart*, 74 Ala. 198; *McMath v. Debardeleben*, 75 Ala. 65; *Mathews v. Mathews*, 104 Ala. 303.

The trust estate created by the deed of Daniel Pratt to Dr. Charles A. Edwards terminated upon the death of Agnes P. Edwards, and the fee simple title in the property conveyed vested absolutely in the children of Agnes P. Edwards.—*McBrayer v. Cariker*, 64 Ala. 50; *Schafer v. Lavretta*, 57 Ala. 14; *Bercy v. Lavretta*, 63 Ala. 374; *Tindal v. Drake*, 51 Ala. 574; *Wilkerson v. May*, 68 Ala. 33. The depositions should not have been suppressed. *Wisdom v. Reeves*, 110 Ala. 418; *Thomas v. Degraffenreid*, 27 Ala. 561. ✓

MCCLELLAN, C. J.—Section 983 of the Code provides: * * * “Any instrument in writing signed by the grantor, or his agent having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument.” This provision is remedial and, therefore, to be liberally construed to the end of giving the intended operation to a deed though it be inartificially drawn and lacking in positive or direct expression of the grantor’s intention. The principle of the statute was patent in the construction and interpretation of the deed involved in the case of *McBrayer v. Cariker*, 64 Ala. 50. It was there held that by a conveyance to Sidney S. Cariker in trust for his mother and her living and afterborn children the grantor intended that the trust should continue only during the life of the mother, and that upon her death the full legal title freed from the trust should unite with the equitable title in her children; and the conveyance was given effect accordingly though it contained no words to that effect. The result was reached mainly upon the considerations that “the preservation of the legal title until they who were entitled to

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take as after-born children could be ascertained, is the characteristic of the trust, distinguishing it, if it is distinguishable, from a naked, dry, or passive trust, which the statute [of uses] divests and removes as an obstacle to the union in the *cestui que trust* of the legal and equitable estate," and that as all the ultimate beneficiaries were necessarily ascertained at the death of the mother, the extension or enlargement of the estate of the trustee beyond her life, "intercepting the vesting of the fee simple, legal estate in the *cestui que trust*, would be without an object and of detriment to them."

The deed involved in the case before us is like that considered in *McBrayer v. Cariker*, in respect of the absence from it of all stipulation or declaration as to the term of the trust, how long it shall continue, or when it shall terminate. So far as the grantor here has expressed himself he may have intended the trust to continue forever. But he could not in fact have meant that, because the trust is for the benefit of certain persons, and those persons cannot live forever to take the benefit. Nor could he even have intended that the trust should continue during the lives of the beneficiaries, because the ends to be subserved by the trust could be fully accomplished short of the deaths of all the beneficiaries; and it is familiar law that a trust estate of this sort ceases as soon as the purposes of its creation have been accomplished. This trust was an active trust, in contradistinction from a dry, naked trust, which the Statutes of Uses executes. The conveyance has the feature which was assumed in *McBrayer v. Cariker*, to save a similar trust from the operation of that statute: Its beneficiaries were Mrs. Edwards and her living and after-born children. Proceeding here upon the assumption indulged in that case this feature would have kept the trust alive until the death of Mrs. Edwards, since that event would have ascertained and fixed the ultimate beneficiaries; and by the same token the trust would then have terminated had its purpose only been to keep the property intact to certain uses until such beneficiaries were thus ascertained. But this was not the sole purpose

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of the creation of this trust. One other important feature of this conveyance which did not appear in the *Carrick* deed is the power and duty conferred and imposed upon the trustee to sell the corpus of the estate in certain contingencies for reinvestment to the same uses. But so far as this characteristic is concerned the trust, but for yet other conditions of this conveyance, would still have terminated on the death of Mrs. Edwards. These other conditions are that the property was to be held by the trustee as a home for the wife of the trustee and their children, and for her support and maintenance, and "for the support, maintenance, protection and education" of said children. The language of the instrument in this connection is as follows: "That the said Charles A. Edwards is to hold the above mentioned and described premises as trustee and they shall be held for the use, benefit and behoof of Mrs. Anger P. Edwards, wife of said Charles A. Edwards, and her children by the said Charles A. Edwards, and as trustee for them and in special trust for the said Agnes P. Edwards and her said children or issue, to live, dwell and inhabit thereon and therein, and for the support and maintenance of the said Agnes P. Edwards, and for the support, maintenance, protection and education of said children or issue. The above mentioned and described premises are to be held only as trustee of the said Agnes P. Edwards and the said children or issue of the said Charles A. Edwards, and are not in any event whatever to be subject to the past, present or future debts or obligations, either legal or equitable, of the said Charles A. Edwards." It is clear upon this language that the grantor contemplated that the lands should be held and maintained by the trustee as a home for both Mrs. Edwards and her children, not only during her life, but so long after her death as the children or any of them continued of an age entitling them to the protection and shelter of the parental roof and to the maintenance incident thereto, and to such education as was customary under their circumstances of neighborhood, family and pecuniary conditions. Assuming that the children were of such immature age at the

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death of their mother, it is manifest that the grantor's purpose as to them would have been thwarted and defeated if thereupon the trust had terminated and the legal title had passed into them as tenants in common with the necessarily consequent right in each to have the lands—the home—sold and the proceeds distributed among them. In such event the home would have been broken up, and the rights of all “to live, dwell and inhabit thereon and therein,” and to be supported, maintained, protected and educated by and out of the whole estate would have been defeated and destroyed. Then, too, some of the children might at the time of Mrs. Edwards' death have attained their majority, or, short of that, have received the support, protection and education contemplated, and been emancipated, while others of them might yet have been of such tender years as for a long time afterwards to require the maintenance of the home for their nurture and protection and its rents, incomes and profits for their support and education. Hence the termination of the trust at the mother's death would not only have deprived the younger children of the use declared in their favor by the instrument, but would have operated to palpable inequality and inequity through the distribution which would have followed in that the older children would have received all the benefits of the trust estate and their full distributive shares in the proceeds of the corpus of the property while the younger would have enjoyed none of the benefits or only a part of the benefits of the trust and no more than the others on distribution. The only way to avoid such unjust consequences, and to secure to all the children the full benefits of the trust estate, the only way to give effect to the manifest intention of the grantor, is to hold that this conveyance created an active trust to continue in every event for the life of Mrs. Edwards, and after her death during the minority of the youngest child, or at least until the youngest child had received the contemplated support, protection, shelter and education from and out of the estate and reached an age meet for emancipation and had been emancipated from the home pro-

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vided by the instrument. This construction assumes the execution of the trust according to the intention of the grantor, and puts an end to the trust when its objects have been thus attained, uniting the legal with the equitable title in the *cestui que trust*, upon the consideration that enlargement of the trust estate beyond that point, thereby further "intercepting the vesting of the fee simple, legal estate in the *cestui que trust*, would be without an object, and of detriment to them."—*McBrayer v. Cariker, supra*. That case, as we have seen, is on all-fours with this one in respect of the want of an express limitation of the estate over after the trust should terminate; and in its holding that upon that event the legal estate in fee united with the equitable estate already in the children, it is a direct authority for the like proposition here that, at latest, upon the coming of age of the children of Mrs. Edwards they became holders of the legal, as they had all along been the holders of the equitable, title in fee. It was made to appear on the hearing below that Mrs. Edwards was dead, that one of her four children was also dead, and that each of her other children was over the age of twenty-one years. It was also shown, though perhaps not necessary, that Charles A. Edwards, the trustee, had died recently before the filing of the petition. It is clear, therefore, that the trust had terminated, and that the probate court had jurisdiction upon proper petition to decree the sale of the land for distribution to and among the tenants in common.

The petition in the case to that end was filed by an heir of the deceased child of Mrs. Agnes P. Edwards. It appears that that child died in 1889, but it does not appear whether Mrs. Edwards was dead at that time, nor whether the other children had then attained full age, or, had received the education and protection contemplated by the grantor and ceased to be members of the family though not of full age. Hence, it does not appear that the full legal title in common was in the deceased child, Holman Edwards, at the time of his death. But, as we have seen, it was the intention of the grantor that the whole estate, legal and equitable, should go to these beneficiaries of whom Holman was one, and that was the

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effect of this deed—the equitable estate primarily with which should be united the legal estate upon the termination of the trust. They, therefore, in reality took the whole estate subject to the trust. Each of the children had title in common to the whole estate, subject to the uses declared in the conveyance. Holman Edwards had this equity fee along with the others. None of them took by descent from their father, the trustee; but each took by purchase from the grantor in the deed: It was an estate by deed and not an estate by descent. The beneficial, equitable title in fee in Holman Edwards was of heritable quality and passed by descent upon his death to his heirs at law, his children, one of whom is the petitioner in this case. When he died they succeeded to his title, the title of the land subject to the trust. The trust having been executed, they take now the title discharged of the trust, the legal title in fee to the undivided portion of the land that would now be his had he lived, and this petition is properly exhibited by one of them.

The petition in this case describes the land, it makes all the tenants in common parties, shows in a way the interest of each, and which of them are infants, and states that “the property cannot be equitably divided among the several joint owners of the same.” It was a sufficient petition and its filing gave the probate court jurisdiction to proceed in the matter and upon proof of the allegations of the petition to decree a sale of the land for distribution.

This petition, however, should have alleged the death of Mrs. Agnes P. Edwards, and it should have prayed distribution of one-twelfth of the proceeds to the petitioner, Eugene Edwards and Marie Edwards, respectively, instead of praying the distribution of one-fourth to them jointly. The petition is also inaccurate in describing the tenants in common as heirs of Charles A. Edwards. In respect of this land they are not the heirs of said Edwards, but they take under the deed from Pratt, the surviving children of Agnes P. Edwards directly as purchasers, and the children of Holman Ed-

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wards, who took also by purchase, as his, and not Charles A. Edwards' heirs.

The probate court erred in rendering the decree without having the infant defendants represented by guardian *ad litem*.—Code, § 3180.

The court also erred in overruling the motion to suppress the depositions of the witnesses Alexander and May. These depositions were not taken as in chancery cases, in that notice of the filing of the interrogatories was not given as required by the statute.—Code, §§ 3181, 732, 733. Moreover, the interrogatories were not addressed to May at all, and his mode of answering them is, to say the least, not to be commended. We do not think there is any merit in the further ground of the motion that the cause was not at issue when the interrogatories were filed or the depositions taken. On filing the interrogatories, the petitioner should have stated the places of residence of the witnesses.—Rule 60, Chan. P. Code, p. 1213.

The petition should be amended in line with what we have said above; guardians *ad litem* should be appointed for the infant defendants, etc., and depositions should be taken "as in chancery cases" in support of the petition.

Reversed and remanded.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Action to recover Money paid on a Contract.

1. *Construction of contract; intention of parties; ascertainment thereof.*—In construing contracts, the great object is to ascertain the intention of the parties and in ascertaining same, the court must place itself in the situation of the parties at the time of making the contract, and consider their obvious designs as to the purpose to be accomplished.

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2. *Same; same; case at bar.*—Where there has been a contest over a will and one of the parties thereto, in a compromise settlement between the contestants, contracts that \$13,000 shall be paid to the other contestant, and that “no court costs or other charges arising from or connected with any proceeding concerning the contest or petition to probate the will shall attach to or be paid by” such other contestants and contracting himself “to pay all the court costs and lawful debts of the estate” such agreement applies to costs growing out of the contest or petition to probate the will which have been paid by the other party before the compromise settlement was made, as well as to those costs which had not been paid, and such other party can recover the amount so paid by him in costs.

APPEAL from Madison Circuit Court.

Tried before the Hon. PAUL SPEAKE.

This was an action by the appellant, Ada F. McDonnell, to recover of the appellee, Llewellyn Jordan, money paid by appellant as costs in a proceeding in the United States Court, growing out of a contest between appellant and appellee over the terms of the will of Mattie Lee Fennell, deceased. The contest over the will was settled by a compromise between the parties, set out below. The first count of the amended complaint in the case is as follows: “Plaintiff claims of the defendant the sum of forty-two and 70-100 dollars, paid by her on November 17 1897, to the clerk of the Federal court sitting at Huntsville, Alabama, said amount being a bill of costs arising out of the contest of the will of Mattie Lee Fennell, deceased, and the defendant by the terms of certain written instruments, four in number, copies of which are hereto attached marked respectively Exhibits A, B, C and D, undertook and agreed to pay said court costs, but he has failed to do so, and hence plaintiff asks judgment with the interest thereon, which is due. Plaintiff has complied with her part of the contract and has demanded the payment of said fees and court costs of the defendant. The court costs above referred to arose out of the contest of the will of Mattie Lee Fennell, deceased, and Ada M. McDonnell, as contestant, and Llewellyn Jordan, as contestee, in the circuit court of the United States, sit-

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ting at Huntsville, Alabama, the same having been removed to the said circuit court of the United States on the petition of Llewellyn Jordan. Exhibits A, B, C and D are intended and prayed to be taken as part of count No. 1. The second and third counts of the complaint are practically the same in form and averments as count No. 1, except that they relate to different items of costs paid in the United States Court one for \$306.25, and one for \$210.60. The 4th count of the complaint is as follows: "4. Plaintiff claims of the defendant the further sum of twenty-five dollars due by a contract between the plaintiff and defendant as shown by the instruments of which the exhibits hereto attached marked, respectively, 'A, B, C and D' are copies." Exhibit A is a copy of a proposition made by appellant to appellee as a basis of settlement of the controversy over the will, offering the appellee whichever side of the proposition he desired. Exhibit B, which accepts the proposition in behalf of the appellee, is as follows: "Dr. Lewellyn Jordan in response to the proposition made to him by Dr. Henry McDonnell and his wife, Ada F. McDonnell, dated September 20, 1902, as a basis of settlement of the contest now pending in the probate court of Madison county, Alabama, in the matter of the will of Mattie E. Fennell, deceased, says: He, Llewellyn Jordan, accepts that proposition by the terms of which the balance of the property, including the real estate, tenements, stored furniture, and money or other property will go to him, and he agrees to pay all court costs, lawful debts against the estate and special administrator's fees, and he is to give and cause to be turned over to Dr. and Mrs. McDonnell out of the cash assets of the estate of Mattie Lee Fennell the sum of thirteen thousand dollars, to include the Alabama bonds belonging to the estate. No court costs or other charges arising from or connected with any proceedings concerning the contest of or petition to probate the will shall attach to or be paid by Dr. or Mrs. McDonnell. The legal proceedings necessary to carry out the above will be properly written up before the property is passed. Dr. and Mrs. McDonnell are to release all claims against the es-

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tate. The contest of the will is to be withdrawn and the will admitted to probate. September 20, 1902. (Signed) Llewellyn Jordan." Exhibits C and D relate to details of the settlement. The date of the compromise was September 20, 1902. The date of the payment of the costs of the United States court was in 1897. Dr. Jordan declined to refund to appellant such costs on the ground that the provision that he was to pay all costs of the settlement related to those costs only which were unpaid at the time of the agreement, and not to costs which had been paid prior thereto. He demurred to plaintiff's amended complaint on the following grounds. To the first count because: "1. Said count shows that said sum was paid by plaintiff on November 15, 1897, and the said written instruments, Exhibits A, B, C and D, were not executed until the month of December, 1902, and they contain no provision agreeing to reimburse plaintiff for any amounts previously paid out by her as court costs." Said count seeks to recover a sum alleged to have been paid out by plaintiff as court costs, which it avers defendant agreed to pay by the terms of four written instruments, Exhibits A, B, C and D, and said written instruments show upon their faces that they are a proposition of compromise, acceptance of the same and papers relating to the compromise of the contest of the will of Mattie Lee Fennell, deceased, and said count does not say that the compromise was effected, or that plaintiff carried out and performed her part of the compromise. 3. Said count shows that the amount sued for was paid out by plaintiff before the execution of the written instruments, and said instruments contain no provisions or stipulations binding defendant to pay plaintiff back any sum paid out by her for costs prior to the acceptance of the proposition of compromise. 4. Said count seeks to recover costs paid by plaintiff "and arising out of the contest of the will of Mattie Lee Fennell, deceased, prior to the making and acceptance of compromise shown by exhibits A, B, C and D, and by the express terms of said compromise as shown by said exhibits the plaintiff was "to release all claims against the

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estate. 5. Said count does not show that any demand was ever made on the defendant to pay the amount of court costs sued for and described therein prior to the bringing of this action. Said count does not and the exhibits thereto do not show that the defendant ever agreed or contracted to pay the court costs mentioned and described therein. 7. Said count seeks to recover costs paid by plaintiff 'to the clerk of the Federal court sitting at Huntsville, Alabama,' but does not show what Federal court it was or what character of proceeding the bill of costs arose in. 8. Said count does not say that the bill of costs arose in a proceeding of which the Federal court sitting at Huntsville, Alabama, had jurisdiction. 9. Said count does not give the style of the case or describe the proceeding in which said bill of costs arose." The defendant demurred to the second count, on the grounds assigned above to the first count, and also the following additional grounds: "1. Said count does not show when the plaintiff paid said bill of costs. 2. Said count does not show that plaintiff paid bill of costs prior to the execution of the written instruments, Exhibits A, B, C and D. 3. Said count does not show the United States Court of Appeals for the 5th circuit acquired jurisdiction of the contest of the will of Mattie Lee Fennell, deceased." To the third count on the grounds assigned to the last count, and also because "said count does not show that the bill of costs therein referred to was paid by the plaintiff subsequent to the execution of the written instruments, exhibit A, B, C and D." To the 4th count he demurred, because "1. Said count and exhibits A, B, C and D show upon their faces that defendant did not contract to pay plaintiff the twenty-five dollars sued for. 2. Said count does not show how or in what way defendant is indebted to plaintiff in the sum of twenty-five dollars, and said exhibits contain no reference to same." The court sustained each of said demurrers. The plaintiff declined to plead further and the court dismissed the case. The plaintiff appeals and assigns the ruling of the trial court on the defendant's demurrers as error.

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GRAYSON & GRAYSON, for appellant.—The plaintiff having received as her portion of the estate the “cash proposition,” she received it by the express stipulation that she was to pay no court costs of any kind or character connected with or arising out of the contest. The language is broad and sweeping. The language “no court costs” would refer to every character of court costs.

A promise by a party to a suit to pay the bill of costs therein is based upon a valuable consideration.—*Warren v. Booze*, 15 Johns (N. Y.), 223. The words are “no court costs shall attach to or be paid by her, the plaintiff. Why was the word “attach” used if it was not intended to cover the case brought here.

R. W. WALKER and S. S. PLEASANTS, *contra*.—The provision as to the payment of costs is plainly prospective in its operation. Defendant did not agree to reimburse plaintiff for any amounts previously paid out. The payment of the \$13,000 was evidently understood to be payment in full. As a matter of fact, upon such payment plaintiff executed a receipt in full. If it had been contemplated that any further payment was to be made to plaintiff, some further provision would have been inserted in the stipulation, the express object of which was to provide for carrying out all the provisions as to payment to be made to plaintiff.

TYSON, J.—A single question is presented for our determination by the record in this case:—a correct construction of the written contract between the parties made on exhibit to the complaint.

In construing contracts, the great object is to ascertain and, if possible, effectuate the intention of the parties. “In ascertaining such intention the court must place itself in the situation of the contracting parties at the time of making the contract and consider their obvious design as to the purpose to be accomplished.”—*McPherson v. Harris*, 59 Ala. 620.

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rounding circumstances. The occasion which gives rise to them, the relative position of the parties and their obvious design as to the objects to be accomplished, must be looked at, in order to arrive at their true meaning and to enable the court to carry out their intention, if lawful. It often happens that parties use very inapt expressions in drafting their instruments, yet, their true meaning and intention may be fairly gathered from the instrument, when considered."

It is often the case that it is only by the aid of parol evidence that courts can ascertain what were the circumstances under which a contract was made; what was the relation of the parties and what was in their mutual knowledge.—*McGhee v. Alexander*, 104 Ala. 121.

It is entirely apparent from the contract that the object sought to be accomplished was a settlement of a controversy between the parties which had arisen over the will of one Fennell which had been propounded for probate in the probate court of Madison county and contested by the plaintiff.

It is also equally clear that it was the intention of the parties not only to agree, as to how the property of the testatrix was to be divided between them, but also by whom the costs of the contest of the validity of the will should be paid. This is manifest from those provisions of the contract which provides that plaintiff was to receive \$13,000.00 of the cash assets of the estate and "no court costs or other charges arising from or connected with *any proceedings concerning* the contest or petition to probate the will shall attach to or be paid" by her, and that defendant was to have the balance of the property belonging to the estate, he "to pay *all* the court costs, lawful debts of the estate," etc. In other words, the obvious purpose of the contract was to eliminate the contest of the will, to admit it to probate, to divide the estate between the parties and to make provisions for the payment of the costs which had been incurred in the contest proceedings. But it is said that the payment of the only costs provided for by the contract were those incurred in the probate court. Is this true? We think not.

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It appears from the averments of the complaint that after the contest had been inaugurated in the probate court, that upon petition of defendant the cause was removed to the circuit court of the United States and from that court appealed to the circuit court of appeals.

Of necessity, costs accrued in those courts for which one or the other of the parties became liable. This was known to both of them at the time the contract sued upon was entered into.

It is true the complaint does not aver that the cause had been determined by the Federal court when the contract was made, but the contract sufficiently shows this. It refers to the contest as now pending in the probate court, provides for its withdrawal and the admission of the will to probate in that court, which was done under the contract. This, of course, could not have been accomplished with the contest pending in the Federal court.

So, then, at the time the contract was entered into there were costs incurred in the Federal court for which either the plaintiff or defendant, or both, were liable. And in view of the provisions of the contract quoted above, and the object sought to be accomplished, we think that it was the intention of the parties that the payment of those costs should be provided for and that they were provided for. In other words, we entertain the opinion that defendant's promise to "pay all the costs" covers the costs in the Federal court.

But it is said that since plaintiff paid those costs before the making of the contract, that defendant did not undertake to reimburse her; that it was only contemplated that she should be paid "the sum of \$13,000.00, to include the Alabama bonds belonging to the estate." If plaintiff, as averred, paid the sum of money as costs, and they were properly taxable as such, we apprehend that the mere fact that she is the owner of the claim for costs, instead of the officers of the court in which it accrued, can make no possible difference. Her ownership of it, in view of defendant's promise to pay *all court costs*, does not, in our opinion, destroy or impair the value and char-

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acter of the claim paid by her so as to prevent its inclusion in the word "costs" as used in the contract.

Nor do we think that the provision of the contract for the payment to plaintiff of \$13,000.00 of the assets of the estate precludes the plaintiff from asserting the demand here sued upon. The payment was to be made by the special administration of the estate. The court costs were to be paid by defendant personally.

Furthermore, we think that it was the intention of the parties that the \$13,000.00 was to be net to the party who accepted that term of the proposition, free of all costs or other charges, and that the party accepting the proposition to take the remainder of the estate was to bear all the burdens incident to the litigation, such as court costs, etc., etc.

Reversed and remanded.

MCCLELLAN, C.J., SIMPSON and ANDERSON, J.J., concurring.

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Prosecution for Assault with Intent to Murder.

1. *Conflict in evidence; introduction of contradictory statements.*
In a prosecution for assault with intent to murder, where there is conflict in the evidence as to who was the aggressor, it is admissible, after laying predicate, to prove a contradictory statement of the prosecuting witness as to material facts.
2. *Effect of contradictory statements as to credibility of the witness' testimony; charge in relation to.*—A charge to the jury that "if any witnesses have made contradictory statements as to material facts in this case, this may, in the discretion of the jury, create a reasonable doubt as to the truth of the evidence of such witnesses" does not assert a correct legal proposition and is properly refused. (*Overruling Gregg v. State*, 106 Ala., 14; *Wilbourn v. State*, 114 Ala. 19.)
3. *Assault with intent to murder; circumstances from which intent may be inferred.*—In a prosecution for assault with intent to

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murder, the intent may be inferred from the character of the assault, the want or use of a deadly weapon, and the presence or absence of excusing or palliating facts or circumstances.

4. *Same; same; length of time that assaulted party is confined.*
The length of time that the assaulted party is confined as a result of the wound inflicted on him by the defendant is material to show as to whether or not there was an intent to kill, as the extent of the wound may shed light upon the subject and would be a proper consideration for the jury in determining the intent.
5. *Proof of good character of witness whose testimony had been impeached by evidence of contradictory statements, admissible.*
Where a witness has been impeached by proof of contradictory statements, evidence of the good character of such witness is admissible.
6. *Same; testimony of father.*—The father is a competent witness to testify to the good character of the son.
7. *Admitted showings as to evidence of absent witnesses; effect when such showing is not introduced and the witness appears and testified contrary to the showing.*—The rule that an attempt by a party to make the false appear true is a circumstance which the jury may consider to the disadvantage of the party so doing, does not apply where a showing is admitted, but is not introduced by the party in whose favor it is made, and the witness subsequently appears and testifies contrary to the showing.
8. *Same; introduction of witness, for whom a showing in behalf of the defense has been made, by the State.*—A showing as to a witness of the defense which has been admitted by the State but not introduced by the defense and which, on the appearance of the witness during the trial, is introduced by the State, and the State cannot contradict same by the introduction of the witness to prove the falsity of the showing.
9. *Drunkenness as proof of lack of intent.*—To prove specific intent, partial intoxication will not avail. The intoxication must be shown to be such that the defendant's "mental faculties, because of drunkenness, were so overcome and stupefied as to render him incapable of distinguishing between right and wrong."
10. *Presumption of malice from use of deadly weapon.*—The law presumes malice from the use of a deadly weapon on making an assault unless the evidence in the case rebuts that presumption, and unless the evidence overcomes such presumption, such assault is in law a malicious assault.

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11. *Charge containing a statement of undisputed fact.*—A charge to the jury as follows: "Did the defendant commit an assault upon Grady Cox with a knife. There is evidence that he did," is proper when the fact of such assault with a knife is undisputed.
12. *Deadly weapon; knife will be so considered if it cuts through the clothing.*—A charge that the "law pronounces it a deadly weapon if you should find from the evidence that it cut through the clothing" is proper.
13. *Charge as to degree of conviction with which jury should regard defendant's guilt in order to render verdict of guilty.*—A charge that "If, after considering all the evidence, you have a fixed conviction of the truth of the charge,—you are satisfied beyond a reasonable doubt—then it is your duty to convict the defendant," is correct.
14. *Degree of doubt necessary to support acquittal; mere possible doubt insufficient.*—A charge to the jury that "the doubt which will justify an acquittal must be actual and substantial—not a mere possible doubt—because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt" is correct.
15. *Possibility of innocence insufficient to justify acquittal.*—A charge to the jury that "If you believe from the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible he is not guilty, you must convict him," is correct.
16. *Credibility of witnesses and weight given to the testimony, jury is judge of.*—A charge to the jury that "you are the sole judge as to the credibility of the witnesses and the weight that should be given to the testimony" is correct.
17. *A charge which is a mere argument should not be given.*—A charge that "the jury must try this case by the evidence and not by the jokes of the counsel" is a mere argument intended to answer the opposing counsel, and is properly refused.
18. *Same; acquittal of defendant who is doubtfully guilty.*—A charge that "the law is as much vindicated by turning loose the doubtfully guilty as by convicting the guilty" is a mere argument and is properly refused.
19. *Reasonable doubt as to any material fact insufficient to justify acquittal; charge to that effect.*—A charge that "If the jury have any reasonable doubt of any material fact in this case, they must acquit the defendant" is bad.
20. *Assault with intent to murder; if defendant, had death ensued,*

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would only have been guilty of manslaughter in the first degree, he cannot be found guilty of.—In a prosecution for assault with intent to murder, if the defendant, had death ensued, would only have been guilty of manslaughter in the first degree, he cannot be found guilty, where death did not ensue, of assault with intent to murder.

21. *Same; same; charge must define what is manslaughter in the first degree.*—A charge to the jury that “if the jury believe from the evidence that if Cox had died it would only have been manslaughter, in the first degree, the jury cannot find defendant guilty of an assault with intent to murder” is properly refused, because it refers a question of law to the jury and leaves it to them to define what is manslaughter in the first degree.
22. *Evidence; charge as to effect of.*—A charge to the jury that “if the jury believe that defendant had made friends with Cox in good faith and that Cox then began to abuse defendant about the butter and cursed defendant and struck him in the face and that defendant then inflamed by the blow suddenly cut Cox with his knife, you cannot convict him of assault with intent to murder” is properly refused.
23. *Same; same.*—A charge that “if the jury believe from the evidence that Cox was following Brown over the yard and that Cox suddenly attacked him and struck him in the face and the jury believe that Brown suddenly inflamed by this blow cut Cox with a knife, defendant cannot be found guilty of an assault with intent to murder” is properly refused.
24. *Assault with intent to murder; reasonable doubt as to specific intent; charge in relation thereto.*—A charge that “if the jury have a reasonable doubt growing out of the evidence whether defendant assaulted Grady Cox with the specific intent to kill him, you must acquit the defendant,” is bad.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. J. A. BILBRO.

This is a prosecution of the appellant, Edward L. Brown, for assault with intent to murder one Grady Cox. It appears from the evidence that a few hours before the commission of the alleged offense, Cox and Brown had had a difficulty in which Cox had struck Brown with a stick. Cox was a boy sixteen years of age. The evidence shows that Brown just before the cutting which forms

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the basis of this prosecution, while in a very drunken state, told Cox to repeat certain remarks which he, Cox, had made. Cox thereupon struck Brown, and Brown then cut Cox with a knife, from the effects of which wound Cox was confined for about two and a half months.

The defendant duly excepted to the following portions of the general charge given by the court: (1.) "The law presumes malice from the use of a deadly weapon in making an assault unless the evidence in the case rebuts that presumption, and unless the evidence overcomes such presumption, such assault is in law a malicious assault." (2.) "Did the defendant commit an assault upon Grady Cox with a knife. There is evidence that he did." (3.) "The law pronounces it a deadly weapon if you should find from the evidence that it cut through the clothing." (4.) "Before it can be said that the defendant was incapable of forming such intent, it must have been that his mental faculties were so far overcome or stupefied as to render him incapable of distinguishing between right and wrong." The court, at the request of the State, gave the following charges, to which defendant duly excepted: (3.) "The defendant is a competent witness in his own behalf, yet in considering his testimony you would be authorized to weigh it in the light of the interest he has in the result of your verdict, together with all the evidence in the case." (5.) "If, after considering all the evidence, you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt, then it is your duty to convict the defendant." (6.) "The doubt which will justify an acquittal must be actual and substantial—not a mere possible doubt—because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt." (9.) "If you believe from the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible that he is not guilty, you must convict him." (10.) "You are the sole judges as to the credibility of the witnesses and the weight that should be given to the testimony." The

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defendant asked the following written charges, which the court refused to give, and to the action of the court in refusing to give each of said charges, the defendant then and there separately and severally excepted: (5.) "The court charges the jury, it is before the jury that defendant slapped Miller's child and whipped a little negro. (6.) The jury must try this case by the evidence and not by the jokes of counsel." (9.) "The law is as much vindicated by turning loose the doubtfully guilty as by convicting the guilty." (12.) "If the jury have any reasonable doubt of any material fact in this case, they must acquit the defendant." (16.) "If the jury believe from the evidence that if Cox had died it would only have been manslaughter in the first degree, the jury cannot find defendant guilty of an assault with intent to murder." (17.) "If the jury believe that defendant had made freinds with Cox in good faith, and that Cox then began to abuse defendant about the butter, and cursed defendant and struck him in the face, and that defendant then, inflamed by the blow, suddenly cut Cox with his knife, you cannot convict him of an assault with an intent to murder." (18.) "The court charges the jury if the jury believe from the evidence that Cox was following Brown over the yard and that Cox suddenly attacked him and struck him in the face, and if the jury believe that Brown suddenly inflamed by this blow cut Cox with the knife, defendant cannot be found guilty of an assault with intent to murder." (20.) "If the jury have a reasonable doubt growing out of the evidence whether defendant assaulted Grady Cox with the specific intent to kill him, you must acquit the defendant." The jury found the defendant guilty of assault with intent to murder, and fixed his punishment at imprisonment in the penitentiary for two years. From this verdict the defendant appeals, and assigns the various rulings of the trial court, to which exceptions were reserved, as error.

BURNETT, HOOD & MURPHREE, for appellant.—The question as to how long the defendant was confined with his wound was improper. The general character of the

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prosecuting witness was not in issue. It was improper to try to prove same by his father.

The introduction of the showing as to what defendant expected to prove by Miss McCoy, who had been absent, and her testimony that the showing was untrue, was monstrous.

MASSEY WILSON, Attorney-General, *contra*.—The extent of the wound may shed light upon the intent in inflicting it.—*Jackson v. State*, 94 Ala. 85.

Where the defense had attempted to show that the wounded man had the reputation of being quarrelsome, it is admissible to prove the good character of such wounded man.—*Bussey v. State*, 87 Ala. 121; *Bell v. State*, 100 Ala. 78.

Relationship does not disqualify a witness from testifying to good character.

The instruction of the court as to the extent of drunkenness necessary to render defendant incapable of intent is a proper statement of the law.—*Parrish v. State*, 36 So. Rep. 112.

ANDERSON, J.—Appellant, Brown, was convicted for an assault to murder and from said judgment of conviction brings this appeal.

While the assaulted party as a state witness was testifying, a predicate was laid for proving a contradictory statement, which he denied, and which the defendant proved was made by the said witness Brown. We think the contradictory statement was material, as there was a conflict in the evidence, as to who was the aggressor.

The defendant asked in writing the following charge, numbered 13: "The court charges the jury, if any witnesses have made contradictory statements as to material facts in this case, this may in the discretion of the jury, create a reasonable doubt as to the truth of the evidence of such witness," which was refused, and the action of the court in refusing said charge is among the assignments of error. This charge has been held good in *Cregg v. State*, 106 Ala. 44 and *Williams v. State*, 114

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Ala. 19, and which seems to be based upon doctrine in the case of *Washington v. State*, 58 Ala. 355. We do not think the charge in question asserts a correct legal proposition, and *Gregg v. State* and *Williams v. State*, *supra*, are hereby overruled, and said charge 13 was properly refused.

The length of time that the assaulted party is confined as a result of the wound inflicted on him by the defendant, is material to the issue as to whether or not there was an intent to kill, as the extent of the wound may shed light upon the subject and would be a proper consideration for the jury in determining the intent. The intent may be inferred from the character of the assault, the want or use of a deadly weapon, and the presence or absence of excusing or palliating facts or circumstances. *Meridith v. State*, 60 Ala. 441; *Jackson v. State*, 94 Ala. 89. There was no error in permitting Cox to testify how long he was confined from the effects of said wound.

The objection to the proof of the good character of the witness, Grady Cox, was properly overruled, as he had testified as a witness and had been impeached by the defendant as to contradictory statements, and it was permissible to sustain his credibility by proof of good character.—*Haley v. State*, 63 Ala. 89; Second Brick. Digest, 547, § 104. If this rule did not prevail, the only ground assigned to the objection of the testimony of the elder Cox, was because he was the father of the witness, whose character was in question. We know of no rule of law prohibiting the father from testifying, either in behalf of his son or his character when the same has been assailed.

It appears from the record that the defendant announced, "not ready for trial," owing to the absence of several witnesses and was put upon a showing for said witnesses. The showings were prepared and admitted by the state and the trial was entered into. After the trial was in progress one of the witnesses, (Miss McCoy), for whom a showing had been made, appeared. It seems that the defendant neither offered his showing or introduced the witness and that the state was permit-

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ted, over the objection of defendant, to introduce in evidence the showing and then the witness to contradict the showing. There is a principle of law, that if a fraud upon the court be attempted, in the getting up of false testimony, or by any other artifice tending to deceive or mislead, or to make the false appear to be true, and this is knowingly assisted or procured to be done by the suitor, this is a circumstance which the jury may rightly consider, to the disadvantage of the party making, or assisting in such an attempt. An honest cause, the law considers, needs not the aid of such reprehensible methods. But, to justify the application of the principle, there must be some proof of it, or testimony of some fact or circumstance, tending to support such inference. Mere conflict among witnesses examined on the opposing side, without more, does not and cannot raise such inquiry, or bring the principle referred to into play. *Beck v. State*, 80 Ala. 1; 1 Greenleaf on Evidence, § 469; *Childs v. State*, 76 Ala. 93. We cannot see, however, how the foregoing rule can justify what the court permitted in this case. The showing had been admitted by the state and it was clearly within the province of the defendant to introduce it or not in the absence of the witness. On the other hand, when the witness appeared the showing could not be urged as evidence and the defendant then had the right to introduce the witness or not, just as he saw fit, and his failure to do so gave the state no right to introduce the showing. After the showing was offered, it was the state's evidence, and we are at a loss to see how it could then introduce a witness, for no purpose, other than to contradict the facts set out in the said showing. It may be that the rule of making showings is often abused and justice is often delayed by injecting into showings, for the sake of getting a continuance, facts that the witness would not verify, and parties and counsel should refrain, as far as possible, from simulating or manufacturing testimony; and juries often fail to give much credit to showings, because of the often abuse of the rule. Yet there are cases in which lawyers and clients are often deceived as to

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what they can prove by the witnesses. Cases have occurred where witnesses have sworn upon the stand facts entirely different to those stated to the party using them, just prior to the examination. We cannot commend what was done in this case, as it would establish a rule that would be a radical departure from the safeguards thrown around the introduction and admissibility of evidence, simply because it sometimes appears that the contents of a showing may be fabricated. The case at bar is an illustration of the many collateral and immaterial errors that can be injected into a trial by permitting such evidence. The showing was introduced, then contradicted, then defendant undertook to explain and the witness was contradicted, and then character evidence was introduced to bolster up the witness who testified only with reference to this one issue, thus devoting as much time to the truth or falsity of a showing, which was never introduced by the party making it, as was necessary for the trial of the case upon proper issues, to say nothing of the infringement of the elementary rules of evidence.

Assignments 8, 9, 10, 11, 12 and 13, grew out of the introduction of the showing and should not arise on another trial of this case.

Exception 1 to the general charge was not well taken, as it asserted the law.—*Sylvester v. State*, 72 Ala. 201.

The second exception to the oral charge was not well taken. It was simply the statement to the jury of an undisputed fact and which was doubtless uttered as an hypothesis for a fair discussion of the case, in all of its phases and aspects to the jury.—*Woodbury v. State*, 69 Ala. 242; *McNeill v. State*, 102 Ala. 121.

Exception 3 to the general charge was bad, it was the mere garbling of a sentence.

Exception 4 to the general charge was based upon the court's definition of the character of drunkenness necessary to relieve the defendant of the specific intent. Voluntary drunkenness excuses no man for the commission of a crime which does not involve a specific intent, regardless of the nature and character of his mental condition as a result therefrom. The most that can be

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claimed on such subject, is that the fact of excessive drunkenness is sometimes admissible to reduce the grade of the crime, when the question of intent, malice or premeditation is involved.—1 Whar. Crim. Law, § 49; *Parrish v. State*, 139 Ala. 16; *Whitten v. State*, 115 Ala. 72; *Chatham v. State*, 92 Ala. 47; *King v. State*, 90 Ala. 612. In *Chatham v. State*, *supra*, it was held that partial intoxication will not avail to disprove the specific intent; it must be of such character and extent as to render the accused incapable of consciousness that he is committing a crime, incapable of discriminating between right and wrong, stupefaction of the reasoning faculty. We think the definition of the trial judge comes within the foregoing rule.

Exception 5 to the general charge was based upon the testimony of Miss McCoy and the showing, and as that question will doubtless not arise on the next trial it is needless to discuss it.

Charges 5, 6 and 9, given for the state were correct. *Prater v. State*, 107 Ala. 26.

Charge 3, given for the state was proper.—*Smith v. State*, 118 Ala. 117. Charge 10 was correct.

Charge 5 requested by defendant was properly refused.—*Stone v. State*, 105 Ala. 60. Charge 6 is a mere argument intended to answer the solicitor.—*White v. State*, 133 Ala. 222.

Charge 9 for defendant was a mere argument. Charge 12 is bad.—*Liner v. State*, 124 Ala. 1.

Charge 16 is bad. It is true that if death ensued and the defendant was only guilty of manslaughter, that he would not be guilty of an assault with intent to murder where death did not ensue. But the charge refers a question of law to the jury and left it to them to define what is manslaughter in the first degree.

Charges 17 and 18 were properly refused.—*Scales v. State*, 96 Ala. 69. Charge 20 is bad.—*Bush v. State*, 136 Ala. 85.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J. J., concurring.

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Action against Common Carrier for Damages for Personal Injury causing Death.

1. *Pleading; what allegations sufficient to show that suit is in representative and not in individual capacity.*—Where the caption of the complaint states the name of the plaintiff as “F. M. administratrix of the estate of W. M. deceased,” but the six counts of the complaint as originally filed allege in some that “the plaintiff as administratrix of the estate of W. M.” sues, etc., and in others that “the plaintiff, as afore-said (that is as such administratrix) claims,” etc., and said complaint is subsequently amended by adding thereto a 7th count, the plaintiff having moved in her representative capacity for leave of the court to add this count and such leave having been granted to her in that capacity, and the plaintiff alleges in said count that “her intestate” was a passenger, etc., and that “her intestate” was thrown from the train, etc., said count although merely alleging that “the plaintiff claimed of the defendant” the sum sued for, sufficiently shows that said suit is instituted by the plaintiff in her representative capacity and not her individual capacity, and that this is so even though all the other counts in the complaint were either held bad on demurrer, or the general affirmative charge given against them.
2. *Same; for what purposes counts in the complaint charged against are still considered a part of the complaint.*—Counts in a complaint against which the general affirmative charge has been given are still considered in the complaint for all the purposes of showing the capacity in which plaintiff sues.
3. *Action for personal injuries against common carrier; what allegations in complaint sufficient to state cause of action.*—A count in a complaint for personal injuries resulting in death which alleges that the plaintiff's intestate was a passenger on the railroad of the defendant and that said intestate as such passenger was through and by the carelessness and negligence of the defendant's servants, agents, or employees,

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violently thrown from the train and so greatly injured, etc., by the injuries thus sustained that he never recovered therefrom but soon after died on account of said injuries, states a cause of action.

4. *Same; what defects in complaint not noticed on appeal.*—Although said count does not in terms aver that the injury resulted from the defendant's negligence, nor that the servants from whose negligence the injury is alleged to have resulted, were in charge of the train, or the like, no assignment of demurrer having specified this objection to the count, said defect will not be noticed on appeal.
5. *Same; when not necessary to aver quo modo of the infliction complained of.*—Where the complaint shows the duty of carrier by defendant to intestate and that he was injured by negligence on the part of the carrier's servants for which defendant was responsible an allegation in the complaint that decedent "was violently thrown from the train" is a sufficient allegation of the *quo modo* of the infliction."
6. *Same; when not necessary to describe in complaint the character of injuries suffered by decedent.*—Where the suit is instituted by a personal representative to recover damages for injuries causing the death of her intestate, it is not necessary to describe in the complaint the character of the injuries received by said intestate, it being sufficient to show causal connection between the injuries complained of and the death.
7. *Same; when affirmative charge is properly refused.*—Where there is evidence tending to prove the allegations of the complaint the affirmative charge for the defendant is properly refused.
8. *Same; contributory negligence; not negligence as a matter of law to alight from a running train in the night time and at a dark and unlighted place.*—It is not negligence as a matter of law for a passenger to alight from a train running two or three miles an hour and at a dark and unlighted place. The question of negligence *vel non* is one of fact for the jury.
9. *Same; same; same.*—Even though so alighting from a moving train might involve some risk to so alight does not as a matter of law constitute negligence; it being a question of fact for the jury whether or not the risk involved was such as a man of ordinary care and prudence would take under the circumstances.
10. *Same; same; when evidence of complaints of the injured person as to his hurts admissible.*—In an action against a carrier

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for negligently injuring plaintiff's intestate, which injuries are alleged to have resulted in death, and where more than eight months intervened between the date of the infliction of the injuries and the death of the intestate, and where it is a question of fact as to whether the said death was the result of said injuries or was caused by disease, evidence of deceased's complaints of hurts attributable to the alleged negligence of the defendant made throughout the time intervening between the infliction of the injuries and the death are properly admitted by the court where such evidence is confined by the court to the expressions in respect of current conditions to the exclusion of narration of past conditions and of the causation of the present conditions complained of.

11. *Same; evidence; inability of deceased to perform manual labor after he was hurt admissible.*—In such case testimony of the deceased's wife that her husband was never able to do any manual labor after he was hurt is properly admitted.
12. *Variance; what constitutes variance between the averments and the proof.*—One count of the complaint for personal injuries resulting in the death of the plaintiff's intestate, alleged that plaintiff's intestate "was violently thrown from the train and so greatly injured," etc., etc. The proof tended to show that said intestate voluntarily stepped off the moving train on to the station platform, lost his footing and fell, receiving the alleged injuries; *Held*: that there is not a fatal variance between the allegations of said count and the proof, but that the evidence substantially supports the averment which is sufficient.
13. *Contributory negligence; attempting to alight from a moving train on the left foot the train moving to the left not negligence as a matter of law.*—It is not negligence as a matter of law for a person to attempt to leave a moving train on his left foot when the train is moving to the left. It is a question of fact for the jury to determine whether or not under such conditions a man of ordinary prudence would have made the attempt.
14. *Action for personal injury resulting in death; charges; abstract and argumentative charges should be refused.*—If the facts hypothesized in a charge are abstract and the charge is argumentative said charge is properly refused.
15. *Same; same; when refusal to give proper charge error without injury.*—If a proper charge requested of the court by the defendant is refused but another charge to the same effect is

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given by the court at the request of the defendant the error is cured.

16. *Same; same; when charges as of contributory negligence properly refused.*—Written charges requested by the defendant upon contributory negligence which fail to hypothesize that said negligence in point of fact contributed to the injury complained of, are bad.
17. *Same; same; what improper charge in reference to cause of death of injured person.*—In an action for personal injuries resulting in the death of the injured person, where the accident took place in November, 1899, and the death occurred in July, 1900, a charge to the effect that if the jury believe from the evidence that the death of the plaintiff's intestate was caused directly by disease occurring after April 1, 1900, then they must find for the defendant, is bad, in that it fails to negative the fact that the disease was caused by or was the result of the accident.

APPEAL from Circuit Court of Marion.

Tried before Hon. ED. B. ALMON.

Action by Florence Matthews, administratrix of the estate of Walter H. Matthews, deceased, against appellant to recover damages for personal injuries to her decedent causing his death.

The 7th count of the complaint is set forth at length in the opinion. Defendant demurred to that count of the complaint upon the following grounds: (1). For that the count is vague, uncertain and indefinite. (2). For that the count does not show any causal connection between the intestate's death and the alleged negligence of the defendant. (3). For that it is not averred or shown that defendant's agent knew that said intestate was in the act of getting off of said train. (4). For that it does not appear that defendant or its employees violated any duty which defendant owed said intestate. (5). For that it is not averred or shown that said intestate died as a proximate result of the negligence of the defendant. (6). For that the injuries sustained by said intestate are not shown. (7). For that it appears that said intestate undertook to leave a moving train, and that he was thereby guilty of negligence which proximately contributed to his death. (8). For that it is

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not shown wherein defendant or its agent was negligent. This demurrer was overruled by the court.

The 5th Plea of the defendant is as follows: "For further answer to the said complaint and each count thereof, separately and severally, the defendant says that the plaintiff's intestate was guilty of negligence which proximately contributed to the injuries received by him, and such contributory negligence consisted in this: The plaintiff's intestate alighted from a moving train in the night time in a dark and unlighted place without requesting that the train be stopped for him to alight."

The evidence tended to show that the plaintiff's intestate attempted to leave the train of the defendant while the same was in motion; that said attempt was made in the night time at one of the stations on the defendant's road, and at the station where said attempt was made there were no lights and it was dark. In making said attempt the plaintiff's intestate fell or was thrown between the platform of the station and the cars and was thereby injured. The accident took place on the 10th day of November, 1899, and the plaintiff's intestate died on the 12th day of the following July. There was conflict in the evidence as to whether his death was caused by the accident or whether it was the result of natural causes.

The defendant requested the court to give to the jury among others, the following written charges, which the court refused to give: (3). "The court charges the jury that no one has the right to leap from a moving train in the night time at an unlighted place because he is being carried beyond his destination with the expectation of claiming from the railroad damages for any injury he may sustain. His duty is to remain aboard and demand redress for the injury that may be done him." (5). "If the jury find from the evidence that W. H. Matthews alighted from defendant's train at Guin in the night time at a dark and unlighted place without requesting that the train be stopped for him to alight, then the verdict of the jury must be for the defendant on all the

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counts of the complaint which charge simple negligence only." (7). "If the jury find from the evidence that W. H. Matthews negligently got off or negligently attempted to get off defendant's train at Guin while said train was in motion and was thereby injured, the verdict of the jury must be for the defendant on each count of the complaint." (9). "If the jury believe from the evidence that the defendant's train was stopped at Guin a sufficient time to allow W. H. Matthews in the regular and orderly way to alight therefrom and that said Matthews delayed leaving the train until it had started again, and that as he was about to alight from the train he was cautioned by some passenger or other person that the train was running too fast and that he had better wait, and that notwithstanding such caution, if any, he yet attempted to alight from the train while it was so moving and was injured by falling or being thrown from said train, then he cannot recover on any count in the complaint which charges simple negligence." (10). "If in attempting to alight from defendant's train under the circumstances shown by the evidence in this case, W. H. Matthews failed or omitted to do what a reasonably prudent man would have done under similar circumstances, then he was guilty of contributory negligence which will bar any recovery in this case." (11). "The court charges the jury that if it be true that Matthews supposed that he was at his station and the defendant company gave him no sufficient opportunity to get off of the train at his destination, and he had been carried beyond it, the conductor would have been bound on his demand to stop his train and return and put him off at his station, or failing therein the defendant would have been liable in damages for having carried him beyond his destination." (14). "If the jury believe from the evidence that the death of the plaintiff's intestate was caused directly by disease occurring after April 1, 1900, then they must find for the defendant." (15). "The argument is not sound which seeks to trace the immediate cause of the death of W. H. Matthews through the previous stages of physical suffering and months

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of disease and medical treatment to the original accident on the railroad."

The court refused to give to the jury the charges above set out and to such refusal to give each of said charges the defendant separately and severally excepted. The court at the request of the defendant gave to the jury, among others, the following written charge:

(46). "If the jury find from the evidence that W. H. Matthews negligently got off or negligently attempted to get off defendant's train at the depot in Guin while said train was in motion and the injuries he suffered were thereby caused, then the verdict of the jury must be for the defendant."

There were verdict and judgment for the plaintiff assessing her damages at \$10,000.

The other facts sufficient for an understanding of this case are stated in the opinion.

WALKER, TILLMAN, CAMPBELL & WALKER, for appellant.

The demurrer to the 7th count should have been sustained.—*Laughtan case*, 21 So. R. 416; *Armstrong case*, 26 So. R. 351; *Lampkin case*, 106 Ala. 290. The defendant's plea No. 5 was a good plea to present the defense of contributory negligence.—*Johnson case*, 123 Ala. 197; *Lee case*, 97 Ala. 325; *Holmes case*, 97 Ala. 337; *Watkins case*, 120 Ala. 152. That the 7th count did not show properly the plaintiff's right to sue.—*Lucas case*, 94 Ala. 616. The plaintiff's intestate was guilty of contributory negligence.—*Lee's case*, 97 Ala. 325; *Holmes case*, 97 Ala. 337; *Schaufler's case*, 75 Ala. 142. That there was a variance between the allegations of 7th count and the proof.—*Schaufler's case*, 75 Ala. 136. That no causal connection between the injury and cause of death is shown.—*Mutch case*, 97 Ala. 196; *Scheffer case*, 105 U. S. 249; *Armstrong case*, 123 Ala. 248. That it was not competent for plaintiff to show complaints of suffering by her intestate.—*Henderson case*, 89 Ala. 521; *Pearson's case*, 97 Ala. 211; *Bailey's case*, 112 Ala. 177; *Orr's case*, 91 Ala. 553; *Buckalew's case*, 112 Ala. 158; *Reed's* Vol. 142.

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case, 45 N. Y. 574; *Kennedy's case*, 130 N. Y. 654; *Roche case*, 11 N. E. Rep. 630. That there is a distinction to be made between utterances which are the natural expressions or exclamations of pain and those statements not made to a physician for the purposes of treatment which are descriptive of pain; and that the latter are hearsay and not admissible.—*Hale's case*, 90 Ala. 8; *Roche case*, 11 N. E. Rep. (N. Y.) 630; *Kennedy's case*, 29 N. E. Rep. 141; *Leach case*, 30 N. E. Rep. 163; *Williams case*, 37 L. R. A. (Minn.) 199; *Davidson's case*, 30 N. E. Rep. 576; Gillett on Indirect Evidence, Sec. 270. That it is contributory negligence for a man to get off of a moving train at a dark and unlighted place without asking that the train be stopped and to avoid being carried by his destination.—*Lec's case*, 97 Ala. 325; *Holmes case*, 97 Ala. 332; *McDonald case*, 110 Ala. 179.

DANIEL COLLIER AND FRANK S. WHITE & SONS, *contra*. Evidence of complaints of suffering admissible.—*Armstrong's case*, 123 Ala. 248; *Phillips v. Kelley*, 29 Ala. 632; *Western Union Telegraph Co. v. Henderson*, 89 Ala. 521; *Helton v. Alabama Midland R. R. Co.*, 97 Ala. 282; *Birmingham, etc. R. R. Co. v. Hail*, 90 Ala. 10; *Wilkinson v. Moseley*, 30 Ala. 526. The 7th count shows plaintiff sued in representative capacity.—*Watson v. Collins*, 37 Ala. 590; *Lucas v. Pittman*, 94 Ala. 616; 3 Mayfield's Digest, page 74. Affirmative charge ought not to have been given on the 7th count.—*Alabama Midland R. R. Co. v. Johnson*, 123 Ala. 201; *Montgomery & Eufaula R. R. Co. v. Stewart*, 91 Ala. 424; *Highland Ave. R. R. Co. v. Winn*, 93 Ala. 308; *Gonzales v. New York Central*, 1 J. P. 57; Volume 2 Rap. & Mack. Digest. page 264; *Smith v. G. P. R. R.*, 88 Ala. 529; *R. & D. R. R. Co. v. Smith*, 92 Ala. 238; *Highland Ave. R. R. Co. v. Burt*, 92 Ala. 294. It was not necessary to aver the *quo modo* of the infliction complained of.—*Ensley R. R. Co. v. Chawning*, 93 Ala. 26. The 7th count was sufficient.—*M. & O. R. R. Co. v. George*, 94 Ala. 214; *Armstrong v. Montgomery Street Railway*, 123 Ala. 236. The demurrer did not specify the objection to the 7th count and was therefore

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properly overruled.—*M. & L. R. R. Co. v. Chambliss*, 97 Ala. 307; *Brewers case*, 121 Ala. 57.

McCLELLAN, C. J.—The only caption of the complaint was that under which the original counts were written. To these several other counts were added but without further statement of the caption. This caption is as follows: "Mrs. Florence Matthews, Administratrix of the estate of Walter H. Matthews, deceased, versus The Kansas City, Memphis and Birmingham Railroad Company, a corporation." There were six counts in the complaint as originally filed. In the first, fifth and sixth counts, the capacity in which plaintiff sues is thus stated: "The plaintiff, as administratrix of the estate of Walter Matthews," etc., etc. In the second, third and fourth counts the capacity is shown by this averment: "The plaintiff as aforesaid (i. e. as such administrator) claims" of the defendant, etc., etc. Thus the complaint stood undoubtedly as a suit by Mrs. Matthews in her capacity as administratrix of the estate of Walter H. Matthews, deceased, when she as such plaintiff asked leave to amend the complaint by adding thereto count 7. Upon this request the court's order is this: "Florence Matthews, as administratrix of W. H. Matthews, deceased, v. Kansas City, M. & B. R. R. Co., February 5th, 1901. Damages. Leave granted plaintiff to file additional count No. 7 submitted on demurrers, and continued." This amendment to the complaint is in the following language: "7th count. The plaintiff claims of the defendant the further sum of thirty thousand dollars damages, for that whereas, on, to-wit: the 10th day of November, 1899, her intestate, the said Walter H. Matthews, was a passenger on the railroad of the defendant, which was railway corporation for the transportation of freight and passengers, on one of the passenger trains of defendant from Birmingham to Guin, Ala., the plaintiff alleges that on said date her intestate as such passenger was through and by the carelessness and negligence of the defendant's servants, agents or employees, violently thrown from the train, at or near said Guin, Ala., and so

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greatly injured, bruised, hurt and shocked by the injury thus sustained, that he never recovered therefrom, but soon thereafter died on account of the said injuries." This count 7 thus became an integral part of a complaint which in its other six counts affirmatively and directly showed that plaintiff was suing in her representative capacity. In that capacity she moved for leave to add this count and to her in that capacity leave was granted. This count, moreover, by its own terms shows in a way that the plaintiff is therein claiming damages in her representative capacity: It avers that "her intestate" was a passenger, etc., etc., and that 'her intestate,' was thrown from the train, etc., etc. So long as other counts remained in the case, it was not suggested by defendant that this count was not filed and prosecuted by the plaintiff in her representative capacity. A demurrer was interposed to it, but thereby no objection was made for departure or in other respect upon any theory that it set forth a claim in the plaintiff's individual capacity. No motion to strike it was made. But on the trial after some of the other counts had been eliminated on demurrer sustained, and the affirmative charge with hypothesis had been given for defendant as to all the rest except this count 7, the affirmative charge was requested against it also; and one of the arguments here made in support of the exception to the court's refusal of that request is that the complaint—viz., this count 7—claims damages for the plaintiff as an individual, while the proof, if it makes any case for recovery, shows a right of recovery in the plaintiff as administratrix only. The position is not tenable. Several of the counts which stood the attack of the demurrers but as to which the general charge was given for defendant, averred unequivocally that plaintiff sued as administratrix. Though charged against they were still in the case for all the purposes of showing plaintiff's capacity. And upon this with the other considerations to which we have adverted, we hold that in this count 7, the plaintiff sues as the personal representative of Walter H. Matthews, deceased.—*Lucas V. Pittman,*

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94 Ala. 616; *Louisville & Nashville Railroad Company v. Trammell*, 93 Ala. 350.

This count by its averment that the intestate was a passenger on defendant's train shows a duty resting on defendant to safely carry him. It shows too that the defendant did not safely carry him. There was need to show but one thing else in the sufficient statement of a cause of action. That thing was that the failure to carry him safely was due to the negligence of defendant's servants. It is immaterial who the negligent servants were or what their particular stations or duties in the service were. The intestate having been injured by the negligence of a servant of the defendant, according to the averment, it is all the same as respects the rights of intestate's estate and the liability of the defendant whether the negligent servant was a trainman, or a trackman, or a station man, or what not. The negligent act of a servant of the carrier whereby a passenger is thrown from the carrying train and injured is necessarily an act in and about and having a bearing (very decided indeed) upon the carriage of the passenger, and as the act cannot be said to be negligently done unless the doing of it involves remission of duty on the part of the servant owed to the passenger, the charge here is essentially none other than that through the neglect of duty due the passenger from defendant's servant the passenger was violently thrown from the train, etc., etc. The carrier assumes to the passenger the duty of protecting him from the negligent acts—pretermissions of duty—of all its employes, and is liable upon any breach of this obligation. Hence our conclusion that the count states a cause of action though it does not in terms aver that the injury resulted from the defendant's negligence, nor that the servants from whose negligence the injury is alleged to have resulted were in charge of the train, or the like; and evidence having been adduced tending to show causal negligence on the part of defendant's trainmen, the defendant was not entitled to the affirmative charge on the contrary theory.—*M., K. C. M. & B. R. R. Co. v. Sanders*, 98 Ala. 307-8.

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No assignment of the demurrer to this count specified the objection to this count which we have just considered, and no assignment covered this point except perhaps one which was too general for consideration under the statute.

The count showing the duty of carrier by defendant to the intestate, and that he was injured by negligence on the part of the carrier's servants for which the defendant was responsible, it was not necessary for the *quo modo* of the infliction to be averred, certainly not with any more particularity than was used, viz.: that he "was violently thrown from the train." Where, as in this case, the injuries are alleged to have caused the death of the passenger, and damages are claimed by the personal representative for the death, it is not necessary to describe the character of the hurts as it is to some extent where death does not ensue and the injured party himself sues for the damages he has sustained. The damning fact here is the death, and beyond showing the causal connection between the wrong and that result a description of the injuries is not necessary, since the damages recoverable do not depend upon any other characteristic or consequence of the injury than its fatality. A very usual form of averment in this class of cases is that "the intestate was thereby so injured that he died;" and the fact that death did not ensue immediately upon the injury being inflicted can have no bearing to require a further description of it. The averment here is in effect that the intestate was so greatly injured, bruised, hurt and shocked by the injury he sustained from being violently thrown from the train that he never recovered from such injury, but soon thereafter died on account of it. This is an averment to common understanding that he died from the injuries sustained by being thrown from the train, and is sufficient.

It is not necessarily negligence for a passenger to alight from a running train even in the night time and at a dark and unlighted place. It depends upon the speed with which the train is running. It may be running so slowly as to be as safe to alight as if it were

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standing stock still. And even if it were going faster than this, say two or three miles an hour, so that it would not be as safe to alight as if it were at rest, it cannot still be said as matter of law to be negligence to attempt to alight. It is a question for the jury. Plea 5 was therefore bad. With that plea in the case the jury would have been bound to find that intestate was guilty of negligence in alighting while the train was in motion, the slightest motion, though they might have believed that there was no danger from that motion in the act of alighting; or, finding even that the motion was sufficient to involve some risk, they might have found that it was such risk as a man of ordinary care and prudence would take under the circumstances. The danger from the motion, whatever it was, was not necessarily greater because the time was night and the place was dark and unlighted. The passenger may have known the place as well under those circumstances as any other. And to say the most those were also considerations for the jury. The demurrer to this plea was properly sustained.

More than eight months intervened between the date of the infliction of the injuries which plaintiff claims caused the death of her intestate and the date of his death. A prominent issue on the trial arose on the traverse of this claim. For the plaintiff it was sought to show that the injuries were of a serious and permanent nature, continuing unhealed and uncured to, and caused his death. For the defendant it was sought to show that the injuries were trivial in character and extent; that he had recovered from them long before his death, and that his death resulted from other and independent causes. To this issue, manifestly, the nature and extent of the intestate's injuries and their continued effect upon him, were of the same pertinency as if he had not died, but living, had himself sued for damages resulting from the injuries: the character, extent and continuance of the injuries constitute a chief matter of inquiry in the former case as well as in the latter; in the latter on the question of the amount of damages sustained by him,

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and in the former on the question whether the injuries caused his death, and thereby entailed damages recoverable by his personal representative. Being thus the thing under inquiry in this as in the case supposed, evidence of his complaints of hurts, attributable to the alleged negligence of the defendant, made throughout the intervening time was properly received, confined, as it was, by the court to expressions in respect of current conditions to the exclusion of narration of past conditions and of the causation of the present conditions complained of. *Phillips v. Kelly*, 29 Ala. 628; *Western Union Telegraph Company v. Henderson*, 89 Ala. 510; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8; *Roland v. Walker*, 18 Ala. 749.

The circuit court did not err in overruling defendant's motion to exclude the testimony of Mrs. Matthews that her husband, the injured man, was never able to do any manual labor after he was hurt.—*South & North Alabama Railroad Company v. McLendon*, 63 Ala. 266.

The exception to the court's refusal to give the affirmative charge against count 7, requested by defendant is sought here to be sustained on several grounds. One of these, viz, that the suit is by the plaintiff in her individual capacity and the proof does not show any cause of action in her individually, we have already adverted to, and held untenable.

Another ground insisted upon is that there was no evidence before the jury tending to show that intestate's death was caused by his being thrown from the train to which the complaint ascribes his death. It would serve no good purpose to go into a discussion of the evidence relating to this matter. It must suffice us to say that we find that there was evidence adduced before the jury tending to show that the fall from the train was the cause or a proximately contributory cause of intestate's death.

Another insistence is that there was a fatal variance between the averment of this count and the proof in respect of the infliction of the alleged injuries upon Matthews. the intestate,—in respect of the *quo modo* of their infliction—in this, that while the court alleges that he “was violently thrown from the train, and so greatly in-

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jured," etc., etc., the proof is that he voluntarily stepped from the moving train onto the station platform, lost his footing and fell, receiving the alleged injuries. It is to be conceded that there is not in every sense precise correspondence between this averment and the proof. Intestate was not, strictly speaking, *thrown* violently from the train. He stepped from the train. But when he stepped from the train its motion had imparted a momentum to his body which when he set his foot on the platform threw him violently down. So that an accurate statement of the occurrence proved would be this: That intestate through the negligence of defendant's servants was by the motion of the train, as he attempted to alight, thrown violently to the ground and thereby so greatly injured, etc., that he died. In a sense being violently thrown down by the train as he was in the act of leaving it, was being thrown from it. It is probable on the evidence indeed, that the violence to his person which threw him down had its initial effect upon his body just as he set his foremost foot on the platform—the evidence shows that he did not jump with both feet, but that he stepped with his left foot—and started his fall while the other foot was yet on the step of the car. If this were so, it is entirely accurate to say that he was thrown from the car. We think the evidence substantially supports the averment, and that is sufficient.—*S. A. & A. P. Ry. Co. v. Gillum*, 30 S. W. 697; *T. P. Ry. Co. v. Williams*, 62 Fed. Rep. 440; *Hindman v. Timme*, 8 Ind. App. 416; *L. S. & M. S. Ry. Co. v. Hundt*, 140 Ill. 525; *C. H. & I. R. R. Co. v. Revalce*, 17 Ind. App. 657; *Moser v. St. P. & D. R. R. Co.* 42 Minn. 480; *Wilson v. Smith*, 111 Ala. 170, 176.

It is further insisted that the affirmative charge should have been given for defendant for that the evidence without conflict shows that Matthews was guilty of negligence which proximately contributed to his injury in attempting to get off the train when and as he did. We do not find this to be the fact. One phase of the evidence tends to show that his attempt to alight was made when the train had just started and was moving

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very slowly, probably not beyond the rate of a mile or two an hour. Though it was night and the place was not lighted, the jury might have found that he knew precisely the nature and location of the platform, as he lived at that station and had frequent occasion to get on and off trains there; and there is no tendency of the evidence to show that he miscalculated his proposed footing on the platform. It was solely for the jury to say in view of this aspect of the evidence whether he was negligent in making the attempt to alight, as has been often decided. Nor, in our opinion, can it be said as matter of law that he was negligent in the manner of his attempting to alight, i. e., on his left foot, the train moving to his left. A train may be moving so slowly as to admit of this being done without danger, and on the evidence as to the speed or apparent speed of the train when the attempt was made, it was for the jury to say whether a man of ordinary prudence would have made the attempt.

Charge 3 refused to defendant is an apt illustration of the fact that much is said and properly said in the opinions of appellate courts which is not proper to be given in charge to juries. This excerpt from the opinion in *East Tenn. Va. & Ga. Ry. Co. v. Holmes*, 97 Ala. 332, is as applied to the case at bar, patiently abstract and argumentative; and the same is true of charge 11. Charge 5 was properly refused on considerations adverted to above having reference to the issue of contributory negligence *vel. non*.

If the court erred in refusing the 7th charge requested by the defendant, the error was cured by the giving of defendant's 46th charge which was in substance and almost literally identical with charge 7.

Charges 10 and 16 refused to defendant were bad for failing to hypothesize that intestate's negligence therein referred in point of fact contributed to his injury.

The evidential fact hypothesised in charge 9 as to Matthews being cautioned against making the attempt to alight did not demonstrate the negligence of such attempt: The question was still for the jury.

Judge Matthews' death may have been directly caused

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by disease occurring months after his injury, but this disease may yet have been caused by the injury, and defendant would be liable for the death, the chain of causation starting with defendant's negligence and ending in Matthews' death.—*Armstrong v. Montgomery St. Ry. Co.* 123 Ala. 233. Charge 14 was therefore bad.

Charge 15 requested by defendant is a pure *express* argument.

We are not prepared to say that the verdict of the jury was so palpably against the evidence as to justify us in the conclusion that the court below erred in overruling the motion for a new trial.

Affirmed.

HARALSON, TYSON and DOWDELL, J.J., concurring.

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Bill in Equity to enjoin a Suit at Law.

1. *Injunction; equity jurisdiction; evidence relating to lease of land.*—Where at the time of leasing a certain tract of land, the lessee is the colonel of a regiment of the Alabama National Guards, and the lease contract is made to the lessee in his own name, and thereafter an encampment of said regiment is held upon the leased premises, the proof of the fact that the lease contract was made, not for the lessee individually, but for the benefit of his said regiment, and that it was the regiment's lease, and not the lessee's, can be made, if at all, as well in a suit at law by the lessee against the lessor for a breach of contract of lease, as in a court of equity; and the necessity of making such proof as a defence to the claim of the lessee, constitutes no ground for a resort to a court of equity by the lessor for the purpose of enjoining an action at law.

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APPEAL from the Chancery Court of Mobile.

Heard before the HON. THOMAS H. SMITH.

The facts in this case are sufficiently stated in the opinion.

CHARLES L. BROMBERG, JR., and MASSEY WILSON, for appellant.—Cited *Kent et al. v. Dean*, 128 Ala. 608-9; 11 Am. & Eng. Ency. Law (2nd Ed.) 421; *Comer v. Bankhead*, 70 Ala. 493; *Blackburn v. Fitzgerald*, 130 Ala. 584; *Scottish Union, etc. v. Dangaix*, 103 Ala. 395.

MCALPINE & ROBINSON, *contra*.—Under the facts averred, it seems to us, there can be no reasonable question that the purchase of the lumber and of the rights accruing under the lease, and the taking of title in himself, made Colonel Cox a resulting trustee for the First Regiment of the Alabama National Guard. The doctrine is clearly established that where a person purchases a property right with the moneys of another and takes the legal title in himself, a trust results therefrom which may be proved by parol.—4th Mayfield's Dig. p. 1016 par. 238 and cases cited; 27 A. & E. E. L. 248; *Milner v. Standford*, 192 Ala. 277; *Milner v. Rucker*, 112 Ala. 360; *Thompson v. Hartline*, 105 Ala. 263, 268; *Fink v. Umscheid*, 2 L. R. A. 146 (note); *Green v. Green*, 46 L. R. A. 525; 27 Am. Eng. Enc. Law, p. 269 et seq; 2 Pomeroy Eq. Ju., pars. 1030-1, 1075.

HARALSON, J.—J. W. Cox, the defendant below and appellant here, was Colonel of the First Infantry, Alabama National Guards, on and prior to the 1st day of July, 1897. On that day he entered into a written contract with the complainant, William O'Neal, which recited that, "I, William O'Neal, for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, hereby lease to James Wade Cox for the term of four years, to commence on the 1st day of June, 1897. the following described real estate (describing the property.) It is understood and

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agreed that said James Wade Cox shall have the privilege of erecting on said property such buildings as he may see fit and proper, and that he shall be allowed to remove said buildings so erected, upon the expiration of this lease. The said James Wade Cox agrees to surrender said premises at the expiration of the term in as good condition as reasonable use will allow, unavoidable casualties excepted."

It appears that Cox erected on the land mentioned in the lease, a mess hall, store room, guard house and tent floors, and the same was used afterwards as an encampment ground for the First Infantry, Alabama National Guard. It appears that O'Neal, under a claim that he set up to the materials in said erections, refused to allow Cox to remove the same, when the latter brought suit against said O'Neal in the circuit court of Baldwin county, for a breach of said contract of lease. Thereupon, O'Neal filed this bill in the chancery court of Mobile county, alleging that the contract sued upon, although made by Cox as an individual, was in fact made by him as the Colonel of the First Regiment, Alabama National Guard; that subsequent to the making of the contract, the term of office of said Cox, as such Colonel expired, and he was succeeded by Col. DuMont; that Col. DuMont and the quartermaster of the Regiment sold to him, O'Neal, for \$75.00, the property above mentioned, constituting the improvements put on said land by the defendant, and prayed that defendant Cox, be enjoined from the further prosecution of his suit at law. The bill is sought to be maintained upon the allegation "that no legal defense can be made to the said suit of James Wade Cox against Orator, and that orator's only remedy is by this proceeding in this honorable chancery court."

The averment is further made, that although the contract of lease appears to have been executed by the said Cox as an individual, yet, as a matter of fact, the said Cox when he executed said agreement was not acting for himself, but was acting in behalf of the troops commanded by him, and obtained the lease of said land for the purpose of the encampment of said troops; that

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said buildings were not erected with funds of the said Cox, but that the material and the erection of the same were paid for with money from the funds appropriated by the State of Alabama, for the use of the said First Infantry, Alabama National Guard.

The defendant demurred to the bill on many grounds, among them, that the bill shows that complainant has a full and adequate remedy at law; because, if the buildings mentioned in the bill, were erected in the manner stated, and were not erected by the defendant as an individual, this would be a defense at law to the suit pending in the circuit court, and because the complainant by his contract with defendant has estopped himself under the allegations of the bill, from disputing the title of defendant to said buildings, etc.

The court overruled the demurrer, and decreed, that under the evidence complainant was entitled to the relief prayed for.

The evidence tended, on the part of the complainant to show, that the improvements placed on the land were made from funds appropriated by the State for military purposes; and on the part of the defendant, that they were paid for out of funds of his own, and that what he had paid was refunded to him out of the share of the regiment in the State appropriation; that the appropriation was divided among the regiments, after the close of the encampment, *pro rata*, according to the strength of the respective commands and the State incurred no obligation for encampment grounds, and whatever preparations that were made for a place of encampment and necessary erections thereon, were made by the Colonels at their own risk, to be paid afterwards, if the *pro rata* of the annual fund for the particular regiment, was sufficient for the purpose.

But, however that may have been, the written contract of rent between complainant and defendant, was certain and unambiguous, and required the aid of no extrinsic proof to make it certain. By it complainant rented the vacant grounds mentioned, to defendant for four years from the 1st day of June, 1897, and agreed that

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the defendant should have the privilege of erecting on said property such buildings as he might see proper, and should be allowed to remove said buildings so erected, upon the expiration of the lease. What the premises were rented for, is not specified in the contract, and oral testimony of the intention or purpose for which defendant rented the grounds was inadmissible, as having nothing to do with the construction of the contract. *Morris v. Robinson*, 80 Ala. 291.

The complainant in filing his bill, proceeds upon the theory, that the lease contract having been made to Cox in his own name, could not be shown, on the trial of the case at law, to have been made, not for the defendant but for the benefit of the First Regiment, and that it was the Regiment's lease and not Cox'. If it was competent for the complainant to make this proof on a bill in equity, it being a mere rule of evidence, no reason exists why it could not be made, if at all, as well in a trial at law. Such being the case, there was no use in resorting to a court of equity, on the ground that the remedy at law was inadequate.

Whether the complainant having leased the land to the defendant was estopped to deny the lease to him, and show that it was to the Regiment and for its benefit, and whether or not DuMont and his Quartermaster had any right, in the absence of a statute allowing it, to sell the property on the grounds,—even if it belonged to the regiment,—to complainant, are questions raised and discussed on this appeal. But, we need not decide these, or any other error assigned, since there can be no pretense of a right to file the bill, except on the one on which it is based,—“that no legal defense can be made to said suit (at law) of said James Wade Cox against orator, and that orator's only remedy is by this proceeding,” etc.

The decree of the court below must be reversed, and one will be here rendered sustaining the demurrer to the bill, and remanding the cause.

Reversed, rendered and remanded.

[Lunsford v. Bailey & Howard.]

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

Lunsford v. Bailey & Howard.

Action of Assumpsit.

1. *Action of assumpsit; sufficiency of complaint.*—In an action by real estate agents to recover commissions, a count of the complaint which claims a specific sum for the breach of an agreement entered into by the defendant, in which the defendant agreed if the plaintiffs "would procure a customer for her for a certain piece of property at the price of \$3,500, that she would pay them a reasonable commission for their services," and then avers that plaintiffs had complied with all the provisions of said agreement, but that the defendant has failed to pay the plaintiffs any sum for such services, states a cause of action, and is not subject to demurrer, upon the ground that it is not alleged in said count that the customer procured for the property mentioned in the complaint was ready, able and willing to pay for the property the sum fixed.
2. *Trial and its incidents; refusal to give charge when not reviewed.*—Where the only recital in a bill of exceptions relative to the refusal of the court to give a charge requested, is "The defendant, in writing, requested the general charge for the defendant, but the court refused to give the same, to which action of the court refusing to give the general charge in favor of the defendant, he duly excepted," and the charge referred to is not set forth in the bill of exceptions, the Supreme Court will not review the rulings of the trial court in refusing said charge.

APPEAL from the Circuit Court of Birmingham.

Tried before the HON. CHARLES A. SENN.

This action was brought by the appellees, Bailey &

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Howard, real estate agents, against the appellant, Mrs. Susan Lunsford, to recover commissions for procuring a purchaser for property owned by the defendant. The complaint contains four counts. The first three counts were common counts. The fourth count was in words and figures as follows: "Plaintiffs claim of defendant the further sum of five hundred dollars damages, with interest thereon, for the breach of an agreement entered into by her during the month of July, 1902, in substance as follows: Defendants agreed that if plaintiffs, who were real estate agents in the city of Birmingham, Alabama, would procure a customer for her for a certain piece of property at the price of three thousand five hundred dollars that she would pay them a reasonable commission for their services, and the plaintiffs say, that although they have complied with all the provisions of said agreement on their part, the defendant has failed to comply with the following provisions thereof, viz: She has failed to pay plaintiffs any sum for their services." To the fourth count the defendant demurred upon the following grounds: That it is not alleged in said count that the customer procured for the property mentioned in the complaint was ready, able and willing to pay for the property referred to, the sum of three thousand and five hundred dollars." This demurrer was overruled.

The other ruling of the trial court which is reviewed on the present appeal is sufficiently shown in the opinion.

A. LATADY, for appellant. cited.—*Sayre v. Wilson*, 86 Ala. 151; *Cook v. Forst*, 116 Ala. 395; *Henderson v. Vincent*, 84 Ala. 103; *Cook v. Forst*, 116 Ala. 395.

BOWMAN, HARSH & BEDDOW, *contra*.

TYSON, J.—The fourth count of the complaint did not aver an undertaking on the part of the plaintiff "to sell" defendant's property as was done in the case of *Sayre v. Wilson*, (86 Ala. 151), but simply "to procure

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a customer for her for the property at the price of three thousand five hundred dollars," which it is alleged they did. That case, therefore, is not authority for the contention here made, that the count under consideration should allege that the customer procured by plaintiff was ready, able and willing to pay for the property. It was entirely competent for the parties to contract for plaintiffs to procure for defendant a customer for her property, and if they did so, as it is alleged they did, we can see no possible objection to the complaint on the ground urged. The demurrer was properly overruled.

The remaining exception is based upon the refusal by the court to give what is termed in the record as "the general charge" requested by defendant. The language of that charge is not copied in the bill of exceptions. All that is recited in the bill of exceptions relating to it is in these words: "The defendant in writing requested the general charge for the defendant, but the court refused to give the same, to which action of the court refusing to give the general charge in favor of the defendant, the defendant duly excepted." We cannot review the rulings of the trial court in refusing the charge.—*Dannelly v. State*, 130 Ala. 134.

It is true in another part of the record there appears the general affirmative charge with hypothesis, along with other refused charges, but it cannot be looked to in this connection.—*Alabama Construction Co. v. Wagon*, 137 Ala. 388; *Nuckols v. State*, 109 Ala. 2.

Affirmed.

McCLELLAN, C. J., SIMPSON and ANDERSON, J. J., concurring.

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Southern Railway Co. v. Lockwood Mfg. Co.

Action of Trover.

1. *Railroad company's demurrage charges for detention of car; lien exists for such charges.*—A railroad company may legally charge car service or demurrage for the detention of its cars by a consignee or consignor beyond a reasonable time in which to unload them or load them, as fixed by rules adopted by the Alabama Car Service Association; and for such demurrage charges the carrier has a lien on the property shipped.
2. *Same; lien not lost by placing car on particular track to be unloaded.* The placing of a loaded car on a particular track by a railroad company for the purpose of allowing the consignee to unload it, is not such an absolute and unconditional delivery unto the assignee of the articles shipped as would cut off or release company's future right of lien on said articles for legitimate charges for car service or demurrage that might subsequently accrue, by reason of the consignee's failure to unload the car within the time fixed by the rules of the company or of the car service association.

APPEAL from the Circuit Court of Jefferson.

Tried before the HON. A. A. COLEMAN.

This was an action of trover brought by J. L. Lockwood, H. W. Lockwood and A. H. Lockwood, doing business as partners under the firm name of Lockwood Manufacturing Company, against the Southern Railway Company, to recover damages for the alleged conversion by the defendant of 7000 feet of poplar lumber. The damages claimed being fixed at \$260.

The defendant pleaded the general issue and the following special plea: "For further answer to the complaint, defendant says that the car of lumber, a part of which forms the subject matter of this suit, arrived at Birmingham over defendant's line on March 22, 1902,

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to be delivered to the plaintiffs in this cause; that on the same date plaintiffs were notified of the arrival of the car; that the car was not ordered placed until March 29th at 12 M., that car service charges in the sum of one dollar per day or fraction thereof, began to accrue on said car at 7 A. M., March 26th; that at the time the car was ordered placed, car service charges were due in said car for two days and five hours, the 28th day of March having been a holiday, that said charges amounting to \$3.00 were paid when car was ordered placed; that car was placed at 12 M. March 31st; that the nineteen hours free time which plaintiff had to unload the car expired at 7 A. M., April 1st; that at 4 P. M. on April 2nd, demand was made on plaintiff for the additional car service, amounting to one dollar; that plaintiff refused to pay same, whereupon defendant declined to deliver the lumber which was remaining on the car at that time, and which forms the subject matter of this suit. The defendant says that at the time the alleged cause of action arose, it was a member of the Alabama Car Service Association, and as such had bound itself to conform to the rules and regulations of said association; that the rules of said association required it to make car service charges in the amount of \$1.00 per day or part thereof on each car after 48 hours had elapsed, after notice to consignee of the arrival of such car; that this rule was enforced by the defendant in all cases; that it was embodied in the contract of shipment with plaintiffs either expressly or impliedly, and that plaintiffs refused to pay the proper charges assessed in accordance with this rule."

The case was tried upon issue joined upon these pleas. The undisputed testimony showed the following facts: A car of lumber consigned to plaintiffs, arrived at Birmingham, over defendant's line of railroad, from Berry, Alabama, on Saturday March 22nd, 1902. The plaintiffs were notified of the arrival of the car on the afternoon of that day. At twelve o'clock Saturday, March 29th, one of the plaintiffs called at the office of the defendant's agent in Birmingham and paid the freight on this car.

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and in addition thereto \$3.00 car service or demurrage which had accrued on the car up to that time, at the same time ordering the car placed for unloading. The car was placed at twelve o'clock March 31st, on one of defendant's team tracks, the usual place for unloading bulk shipments of this kind. At four o'clock on the afternoon of April 2nd, the lumber was only partially unloaded, and the car still detained. \$1.00 additional car service having accrued after the car had been placed for unloading, the defendant, through its car service clerk, presented the plaintiffs bill for this amount, which they refused to pay. Thereupon the car was sealed, with a part of the lumber still on board and placed beyond the reach of the plaintiffs, and the lumber held for payment of demurrage charges. This is the lumber sued for.

The operation of Rules 1, 2 and 9 of the Alabama Car Service Association, which were introduced in evidence, and which are the rules enforced by the defendant in connection with car service or demurrage charges, is clearly explained by the following uncontroverted testimony of J. B. Franklin, defendant's car service clerk: "In March and April of last year I was car service clerk for the Southern Railway at Birmingham, and my duties were to look after the cars that arrived here over the Southern road for the city delivery, and see that the consignees were promptly notified and that the cars were placed after the freight and all charges were paid, and after the cars were not unloaded within 48 hours after the parties were notified, to collect all car service due on them. The car service charged was \$1.00 per day or fraction thereof on each car, after expiration of the free time of 48 hours. I remember a car of lumber having arrived on the 22nd day of March, 1902, consigned to the Lockwood Mfg. Company. That it was on Saturday, and notice was given to Lockwood Mfg. Company that this car had arrived, some time between 1 and 5 o'clock plain afternoon. The car was ordered placed at 12 o'clock which 29th. Up to that time car service charges had Birmin⁴².

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accrued to the amount of \$3.00. I figure that out this way: I gave notice of the arrival of the car on the afternoon of the 22nd, but under the rules, the time did commence on the car until 7 o'clock the next morning, the 23d. This being Sunday, would throw it the next morning, and the time commenced to count 7 o'clock Monday morning, the 24th. The 48 hours free time allowed expired at 7 o'clock on Wednesday morning, the 26th, and then the car service began to accrue. Thursday morning at 7 o'clock one day had elapsed, and Saturday morning at 7 o'clock two days had elapsed; Friday the 28th was a holiday and holidays and Sundays are not considered in estimating the time for car service charges. Up to 12 o'clock Saturday the 29th when the car was ordered placed, 2 days and 5 hours had elapsed, and \$3.00 car service was collected. The car was placed at 12 o'clock March 31st. Under the rules of the railroad commission the company is entitled to 48 hours in which to place the car, after the freight and all charges have been paid. If the company takes more than that time, it must pay the shipper \$1.00 a day or any part thereof on each car. In counting the time against the company, Sundays and holidays are not included; just like the car service, the rule works both ways. March the 30th having been Sunday, the company placed this car in 24 hours, according to the rules for estimating time, after the car was ordered placed. After the car was placed, the Lockwood Mfg. Company had 19 hours which they had already paid the demurrage for, in which to unload. These 19 hours had expired at 7 o'clock on the morning of April 1st, and at that time car service began to accrue again. I did not present a bill to any member of the firm of Lockwood Company for any additional car service until late in the afternoon on April 2nd, about 4 o'clock. I did not present the bill on the 1st because I wanted to favor Mr. Lockwood. The bill which I presented on the 2nd was for \$1.00, and I presented it to Mr. Lockwood, the old gentleman who was the first witness for the plaintiff. He was at the time at his place of business on 26th street.

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It was also shown that plaintiff had notice of the regulation of defendant in reference to car service or demurrage charges.

Among the other charges requested by the defendant, and the refusal to give each of which the defendant separately excepted, was the general affirmative charge in its behalf. There were verdict and judgment for the plaintiffs, assessing their damages at \$180.00. From this judgment, the defendant appeals, and assigns as error the several rulings of the trial court, to which exceptions were reserved.

JAMES WEATHERLY and J. T. STAKELY, for appellant. This court has held that a rule of a railroad company that a party to whom freight is consigned must receive the same within 48 hours after notice, is a reasonable one, and a charge for storage after expiration of that time is legal.—*Gulf City Construction Company v. Louisville & Nashville R. R. Company*, 121 Ala. 621. As a corollary to this a railroad company may legally charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled.—*Miller et al v. Georgia Railroad & Banking Co.*, 88 Ga. 563; 50 Am. & Eng. R. R. Cases, 79 and notes; *Kentucky Wagon Mfg. Co. v. Louisville & Nashville R. R. Co.*, decided by Louisville (Ky.) Law and Equity Court Dec. 20, 1901; 20 Am. & Eng. R. R. Cases (N. S.) 450; *Miller v. Mansfield*, 112 Mass. 260; *Norfolk & Western R. R. Co. v. Adams*, and authorities cited, 90 Va. 393; *Kentucky Wagon Mfg. Co. v. Ohio & Mississippi R. R. et al*, 2 Am. & Eng. R. R. Cases (N. S.) 722; *Swan v. Louisville & Nashville R. R. Co., et al*, 20 Am & Eng. R. R. Cases 446; *Alabama Railroad Commission in repetition of Youngblood & Ehrman*; *New Orleans & North Eastern R. R. Co. v. A. H. George & Co.* decided by the Supreme Court of Mississippi Nov. 16, 1903. Reported in advance sheets of Sou. Reporter for Dec. 5th, 1903, p. 193.

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As to the second proposition it is a well settled principle of law that a warehouseman has a lien for his charges.—42 Am. Dec. 254 and notes, and cases cited on page 257 and following; 28 Am. & Eng. Ency. of Law (O. S.) page 663. It is equally well settled that where a common carrier, after the arrival of freight, gives notice to the consignee and places the goods in its warehouse, its liability thereafter is that of a warehouseman.—*Collins v. Alabama Great Southern R. R. Co.*, 104 Alabama 390. And the carrier is entitled to additional compensation for its services as warehouseman.—*Gulf City Construction Company v. Louisville & Nashville R. R. Company*, cited above. If the carrier can make an additional charge when it stores the goods in its warehouse and has a lien for such charge, for the same reasons it can make an additional charge and has a lien therefor when the goods remain in its cars after its liability as a common carrier has ceased.—*Miller v. Georgia R. R. & Banking Company* (cited above). *Miller v. Mansfield* (cited above). And the recent case of *New Orleans & North Eastern R. R. Co.*, decided by the Supreme Court of Mississippi (cited above), these last two cases assert directly the proposition that a railroad company has a lien for car service or demurrage charges.

We concede that if the defendant had abandoned its lien it could not afterwards reassert it. But from the very nature of the case the mere placing of the car and allowing plaintiffs to unload part of the lumber could not amount to such an absolute and unqualified delivery as to constitute a waiver. At the time of the payment of the freight and accrued demurrage, the defendant had no way of knowing that any additional charge would become due. It had a right to assume that the plaintiff would unload the car within the nineteen hours they had paid demurrage for. But even if it had known that the car would not be unloaded within that time, and that an additional charge would become due, it would have had no right to make demand therefor, until such charge

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should become due in fact. It could only make demand for additional charges from time to time as they accrued until the car was finally unloaded. If the position contested for by appellee's should be sustained, a consignee might detain a car indefinitely for the purpose of unloading and the carrier would have no redress therefor except by resort to an action at law for his charges.—*Scott v. Delaware, Lackawanna & Western R. R. Co.*, (unreported) ; *Lane et al. v. Old Colony and Fall River R. R.*, 14 Gray (Mass.) 143.

WHITE & HOWZE, *contra*.—The principal question and indeed the only question in this case which we deem it necessary to consider is, whether the appellant had released its lien upon the lumber by delivering it to the appellees. If it had done so, its lien was of course gone and it was guilty of a conversion in taking the lumber from the appellees and in carrying it away.—*Lake Shore etc v. Ellsey*, 85 Penn. State Reps. 283; Story on Bailment, sec. 588; *Beineman v. St. Paul*, 1 N. W. Reporter, 619; *Scars v. Willis*, 4 Allen (Mass.) 212; 4885 Bags of Linseed, 1 Black (U. S.) 108. In case of a ponderous article, all that is necessary to perfect a delivery is the intention of the one to transfer and the other to accept the property in question and to put it in the power of the latter.—*Gorce v. Walthall*, 44 Ala. 161, 165-6. In the case at bar, it was proven that it was the intention of the defendant (appellant) to transfer and of the appellees to accept the lumber, for after all charges then due against it had been paid the lumber was actually put in the power of the appellees for the express purpose of being disposed of by them.—*Ivey v. Owens*, 28 Ala. 641. After the property had been delivered, the appellant had no right to forcibly (for it was nothing less than force) take it away from the appellees and reassert its lien.—*Lake Shore etc. v. Ellsey*, 85 Penn. State Reps. 283; *Pope v. Randolph*, 13 Ala. 215; *Hale v. Barnett*, 26 Ill. 195.

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DOWDELL, J.—The evidence in this case upon the principal issue involved, is practically without dispute. The reasonableness of the Railway Company's rules which were adopted by the Alabama Car Service Association relative to demurrage charges on its cars, and the time limit in the placing of its cars for unloading, and the unloading of the same, by the consignee, etc., as shown by the evidence, seems not to have been denied or questioned.

We concur in the statement made by counsel for appellees in their brief, that the only question in this case necessary to be considered, is whether the appellant had released its lien upon the lumber by placing the car on the "team track" for the purpose of being unloaded. The proposition seems quite clear, that if the appellant, Railway Company, had no lien upon the lumber, then in removing the car with the lumber on it and holding the lumber for the purpose of enforcing a pretended lien, it, the Railway Company, would be guilty of a conversion. This, we understand, is not controverted by counsel for appellant.

The contention of the appellee is that by placing the car of lumber on the "team track" to be unloaded by the consignee was a delivery of the lumber to the consignee, and such a delivery of possession of the property as amounted to a release of whatever lien the Railway Company had on the lumber. It is not denied that the Railway Company, as a common carrier had a lien on the lumber for transportation charges, and for the demurrage charges, which had accrued after notice to the consignee of the arrival of the car of lumber, under the company's rules. Indeed, this question is not involved, as the undisputed evidence shows that the charges had been paid by the consignee, when the car was placed on the "team track" to be there unloaded by the consignee. And it was at this time, that the appellee, who was the consignee, claims that the lumber was delivered by, and passed from the possession of, the Railway Company into its possession, discharged of all antecedent liens and not

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subject to any subsequent lien. It is not denied that the car remained upon the "team track", where it had been placed by the Railway Company for the appellee's convenience in unloading the same, for the "time limit" allowed by the rules of the Railway Company, and that the demurrage for which a lien is claimed accrued after the expiration of the "time limit" for unloading. As stated above, the reasonableness of the rule as to "time limit" and "demurrage" charges, is not questioned, nor is it denied that the appellee had notice of such rule. The question then is, whether a lien on the lumber remaining on the car arose in favor of the Railway Company for demurrage accruing subsequent to the delivery in the manner stated, and after the expiration of the "time limit" for unloading the car.

Leading up to the proposition, it may be stated, that this court has held that a rule of a railroad company that a party to whom freight is consigned must receive the same within forty-eight hours after notice, is a reasonable one, and a charge for storage after that time is legal.—*Gulf City Construction Co. v. L & N. R. R. Co.*, 121 Ala. 621.

And it may be said, as a corollary to this, a railroad company may legally charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled.—*Miller, et al. v. Georgia R. R. & Banking Co.*, 88 Ga. 563; 15 S. E. 316; 30 Am. St. Rep. 170. See also 20 Am. & Eng. R. R. Cases, (N. S.) 450. where will be found a collation of authorities on the question. It is a well settled proposition of law that a warehouseman has a lien for his charges.—*Steinman v. Wilkins*, (Pa.) 42 Am. Dec. 254, and note on page 257; 28 Am. & Eng. Ency. Law, (1st Ed.) p. 663. It is equally well settled that where a common carrier, after the arrival of freight, gives notice to the consignee and places the goods in its warehouse, its liability thereafter is that of a warehouseman.—*Collins v. Ala. Great Southern R. R. Co.*, 104

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Ala. 390. And the carrier is entitled to additional compensation for its services as warehouseman.—*Gulf City Construction Company v. L. & N. R. R. Co. supra.*

It would seem, if the carrier can make an additional charge when it stores the goods in its warehouse and have a lien for such charge, upon like principle and for the same reasons, it may make an additional charge and have a lien therefor when the goods remain in its cars after its liability as a common carrier has ceased.—*Miller v. Georgia R. R. & Banking Co. supra*; *Miller v. Mansfield*, 112 Mass. 260; *New Orleans & North Eastern R. R. Co. v. George*, (Miss.) 35 South. 193.

In *Miller v. Georgia R. R. & Banking Co.*, it was said, "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in the cars, instead of being put into a warehouse." And in the case of *New Orleans & North Eastern R. R. Co. v. George, supra*, it is said, "There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent unfair advantage, and would breed a multiplicity of suits."

The foregoing authorities fully sustain the doctrine of the right of the carrier to a lien upon the goods transported for demurrage charges. Coming then to the main question in the case before us, was the placing of the car of lumber on the "team track" of the Railway Company for the purpose of being unloaded by the consignee, such an absolute and unqualified delivery of the lumber into the possession of the consignee as would cut off any future right of lien for legitimate charges for car service, or demurrage, subsequently accruing? We think not. The delivery of the possession of the lumber, in the manner in which it was made, and under all the conditions and circumstances, was a qualified delivery. The delivery was conditioned upon the lumber being unloaded from the car within a fixed time, and upon a failure of the consignee to comply with this condition additional rights

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and liabilities between the parties arose. The right of the consignee's possession of the lumber was accompanied with the duty on his part to remove the same from the car. It would hardly be contended that the placing of the car for the purpose of unloading terminated all liability of the Railway Company both as carrier and warehouseman while the lumber yet remained on its car. Upon the same principle that a railroad company, when its relation becomes that of a warehouseman, has a lien upon goods for storage charges, it has a lien upon goods for demurrage, or car service. A contrary doctrine would defeat the purpose of the rule of the Car Service Association adopted by the Railroads, and which was made in the interest of commerce generally, and for the benefit of shippers as well as carriers.

The indefinite detention of cars by shippers would naturally tend to impair the ability of the carrier to meet the demands of commerce, and lessen the facility of transportation.

The case of *Lane v. Old Colony & Fall River R. R. Co.* 14 Gray (Mass.) 143, is somewhat similar in principle to the case in hand. In that case the railroad company had placed a shipment of coal in a bin on the company's ground to be removed by the consignee, and after a part had been hauled away, the consignees refused to pay the freight and storage charges. It was held, that the railroad company still had a lien on the coal which had not been hauled away for such charges. We think in principle there can be no difference between a delivery of the coal in a bin to be taken and hauled away by the consignee, and a delivery of the lumber on the car on the Railway Company's "team track" for a like purpose.

Our conclusion is, that a lien for the subsequent charges for car service attached to the lumber in favor of the Railway Company. The evidence being without conflict, the trial court erred in refusing the general charge

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requested by the defendant. And for this error the judgment will be reversed and the cause remanded.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and TYSON, J.J., concurring.

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Bill in Equity to Redeem Certain Lands.

1. *Decree in chancery suit; when shown to be final.*—Where a bill is filed by a mortgagor to redeem certain lands from one alleged to be the mortgagee, and the defendant files an answer and cross bill, claiming that he was not in possession of said lands as a mortgagee, but as a purchaser, and prays in his cross bill to be allowed to retain possession of the land as a purchaser, a decree which, after reciting that the cause was submitted on pleading and proof, then recites, "on consideration thereof, it is ordered, adjudged and decreed" that the demurrer to the cross bill is overruled, that the cross complainant is not entitled to relief, and the cross bill is dismissed; and that the complainants are entitled to relief and to redeem the property; and there then follows directions for the making of an accounting before the register, such a decree is a final decree, which will support an appeal.

APPEAL from the Chancery Court of Bibb.

Heard before the HON. THOMAS H. SMITH.

The facts of this case are sufficiently stated in the opinion. The appeal is prosecuted by the defendant in the original bill, from a decree, and the rendition of this decree is assigned as error. The decree itself is copied in the opinion.

HOGUE, LAVENDER & FULLER, for appellant.

LOGAN & VANDERGRAFF, *contra*.

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SIMPSON, J.—This was a bill filed by appellee for the purpose of redeeming certain lands, held by a mortgagee alleged to be in possession of the lands thereunder. To this bill the appellant filed an answer and cross-bill, claiming that he had not gone into possession under the mortgage, but under a parol contract, by which appellee sold him the land, the consideration being, the mortgage debt, a release to appellee of the personal property covered by the mortgage, and ten dollars in money which was paid to appellee, when appellant was placed in possession of the land.

The question is raised, in the outset, by counsel for appellee, that the decree, in the case, is not such a final decree as an appeal can be taken from. The decree is as follows: "This cause coming on to be heard, was submitted on pleading and proof as noted, and on demurrer to the cross bill. On consideration thereof it is ordered, adjudged and decreed, 1st; that the demurrers to cross bill be, and the same hereby are, overruled. 2nd; That the cross complainants are not entitled to relief, and that the cross-bill is dismissed. 3rd; That complainants are entitled to relief, and to redeem the property on paying whatever may be due, and to an accounting from B. M. Gentry as mortgagee in possession. It is, therefore, further ordered and decreed that it be referred to the register of this court to ascertain and report (a) an account of what is due to the defendant for principal and interest on said mortgage. (b), An account of the rents and profits of the said premises, or value of any saw logs cut from lands, which have been received by the said defendant, or by any other person, by his order or for his use, or which might, but for his willful default, have been so received; and that what shall appear to be due to the plaintiff in taking an account of rents and profits, be deducted from what shall appear to be due to the defendant for principal and interest." Direction is then given about how the report shall be had, and the usual expression reserving further orders.

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While this court has declared that, when a reference is necessary, the *better practice* is to render an interlocutory decree merely expressive of the opinion formed as to the rights of the parties, etc., *Jones v. Wilson*, 54 Ala. 50, yet it has not declared that all decrees where a reference is made are interlocutory. The result of the decision is, 1st; As to the form of the decree, in order to make a final decree, it is not sufficient to state that "it seems to the court that the plaintiff is entitled to relief," or to express the "opinion," that he is, or that "it appears to the court," etc. It must be a clear judicial determination of the fact.—*Vice v. Littlejohn*, 109 Ala. 294; *Trump v. McDonnell*, 112 Ala. 256; *Ex parte Gist*, 119 Ala. 463; *Richardson v. Peagler*, 111 Ala. 478.

2nd; As to the matter of the decree, in order to be final, it must settle all the equities between the parties.—*Garner v. Previtt*, 32 Ala. 13; *Marks v. Semple*, 111 Ala. 637.

We think the decree in this case comes up to the requirements, and is a final decree.

The assignments of error simply raise the question as to whether the court erred in granting to the appellee the relief prayed in his original bill, and as to whether it erred in refusing to appellant the relief prayed in his cross-bill and in dismissing said cross-bill.

If the appellant's contention is sustained, to-wit; that he purchased the land in question from appellee, in consideration of the satisfaction of the mortgage, and other considerations mentioned, then, as a matter of course the prayer of the appellee's bill could not be granted, and the appellant would be entitled to the relief prayed in the cross-bill.

Appellee claims that the contract for the sale of the land cannot be enforced because the property was his homestead, and could not be sold except in compliance with statutory requirements. But there is no allegation in the pleading that said property was his homestead, so that even if the proof on the subject were satisfactory, (which it is not), it would be proof without allegation, which is as insufficient as allegation without proof.

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It is true that appellee does allege, in his bill, that, at the time of the purchase of the Crumpton note and debt, by Gentry, appellee was living upon said land with his family, and, in his answer to the cross-bill, he, in general terms, "repeats the averments of the original bill," but we do not regard this as sufficiently definite averment that he was occupying said land as his home-stead.

From an examination of all the evidence, while there is some conflict in it, we hold that the decided weight of the testimony shows that Gentry did purchase the property from Lawley, for the consideration mentioned, that he paid him the ten dollars, released the personal property and was placed in possession of the land; that the consideration paid was fair and reasonable and that; consequently, appellant is entitled to the relief prayed in his cross-bill.

The decree is, accordingly, reversed and a decree will be entered up by this court, directing the register of the chancery court of Bibb county to execute a deed of conveyance, conveying to B. M. Gentry all the right, title and interest which Joseph Lawley has, in and to the lands described in the original bill in this case.

Reversed and rendered.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

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Action for Trespass.

1. *Appeal; motion to strike pleading must be shown by bill of exceptions.*—Where a complaint is stricken from the file on motion by the defendant, in order for ruling to be reviewed on appeal, it is necessary that the motion and the ruling thereon and the exception thereto, should be shown by a bill of exceptions.

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2. *Action against railroad company; when no cause of action shown.*—In an action against a railroad company, a complaint does not state a cause of action which charges the defendant with collusion with another railroad company by allowing the latter to run over a branch of the defendant's road, and to use the defendant's road to grade such branch of the road, and thereby enable the other company to reach "plaintiff's possession which was taken by strong force from plaintiff by the other railroad company, and cutting a fence around said possession, exposing the crop," to plaintiff's damage, etc.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. OSCEOLA KYLE.

This action was brought by the appellant, James Henry, against the appellee. The complaint as originally filed was in words and figures as follows: Plaintiff charges defendant collusion with Southern Railway Company, by allowing said Southern Railway Company to run over a branch in West Huntsville, belonging to defendant, and to put in a switch in said branch of defendant's to run to Merrimack Cotton Mill, a branch to be graded by said Southern Railway Company, plaintiff further charges on the 9th day of June, 1899, and the privilege allowed said Southern Railway Company, by defendant to use defendant's road to grade said branch to said mill, aided said Southern Railroad Company to reach plaintiff's possession, which was taken by a strong force from plaintiff by said Southern Railway Company, and cutting a fence around said possession, exposing the crop of watermelons and cantaloupes on said possessions to stock and people during crop season in 1899, cutting drainage in crop, which caused great fall off in production, destroying flavor of melons, destroying the entire crop, less ten dollars and fifteen cents. Said possession lying in Madison County, State of Alabama. Plaintiff asks in damage of defendant, fifteen hundred dollars. Plaintiff served notice in writing to attorney of defendant for possession. To this complaint the defendant demurred on the grounds that it was frivolous, and that it stated no cause of action against the defendant. This demurrer was sustained. Thereupon

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the complaint was amended by adding another count. This amendment was upon motion stricken; but the record contains no bill of exceptions. The judgment entry recites that after the court struck the amended complaint, the plaintiff declined to plead further, and judgment was rendered in favor of the defendant.

From this judgment the plaintiff appeals and assigns as error the striking of the amended complaint from the file, and sustaining the demurrer to the original complaint.

W. N. BENSON, for appellant.

OSCAR R. HUNDLEY, *contra*.—Cited *Central of Ga. Ry. Co. v. Joseph*, 125 Ala. 313.

DENSON, J.—There is no bill of exceptions in this case, hence, the first ground in the assignment of error, which challenges the correctness of the ruling of the court in granting defendant's motion to strike the amended complaint, cannot be considered.—*Holly v. Coffee*, 123 Ala. 406; *Cottingham v. Greely Barnham Grocery Co.*, 123 Ala. 479; *Central of Georgia Ry. Co. v. Joseph*, 125 Ala. 313.

The original complaint does not state a substantial cause of action against defendant, and the second ground of demurrer was properly sustained to it.

The judgment of the lower court is affirmed.

Affirmed.

MCCLELLAN, C. J., HARALSON and DOWDELL, J. J., concurring.

[Berry *et al.* v. Bromberg, Excr.]

Berry *et al.* v. Bromberg, Excr.

Bill in Equity to construe Trust Deed, declare Trust terminated, and to compel Executor to settle administration of Deceased Trustee.

1. *Trust deed; when trust under terminated.*—Where property is conveyed to a trustee, "To have and to hold the above described real estate upon the following terms and for the following uses and purposes and no other. That is to say the said Cecil Carter is hereby constituted trustee of said Alice E. Berry, her husband, William A. Berry, joining in the conveyance for that purpose. To hold said property herein described for the use and benefit of said Alice E. Berry, wife of William A. Berry, and during the term of her natural life, and for the benefit of her children during their natural lives. The income to be derived from said property in the way of rents, after all expenses of insurance, taxes and other legal assessments are deducted from the same, only to be used for that purpose, and after the death of said Alice E. Berry the said real estate to be held in trust for the benefit of the children of the said Alice E. Berry. It is hereby covenanted that the real estate shall not be sold by said trustee, Cecil Carter, he holding the same for the benefit of the said Alice E. Berry during the term of her natural life, and after her death in trust for the benefit and use of the children of said Alice E. Berry." The trust thereby created terminated on the death of Alice E. Berry, and both the legal and equitable title to said property vested in her children.
2. *Bill to construe trust deed and to terminate trust; when without equity.*—In such a case, a bill filed by the children of Alice E. Berry against the executor of the deceased trustee, which alleges the death of their mother and father, charges that the executor has come into possession of certain funds belonging to them in his executorial capacity, and avers that since the death of their mother the title as well as the use and benefit and interest in the property conveyed has vested in complainants, and that the trusteeship is vacant on account of the death of Carter, and which renounces each and every benefit,

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right and interest the complainants possess under the trust deed, and prays that the trust created by the deed be adjudged to be terminated upon the death of Alice E. Berry, and to be non-existent, and that the executor be required to render and make an accounting of the administration of the said Cecil Carter of the said trust; or, in the alternative, prays that if the trust did not expire on the death of said Alice E. Berry, that upon their renunciation of said trust, that the trust be decreed to be henceforth annulled, and to have failed for the want of willing beneficiaries thereunder, does not state a case for equitable relief, and a motion to dismiss the same for want of equity should be granted.

APPEAL from Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

The bill in this case was filed by the appellants, who are the children of Alice E. Berry, deceased, against the appellee as the executor of Cecil Carter, who in his lifetime was the trustee in a certain deed of trust executed by Mrs. Berry.

The material averments and the objects of the bill are sufficiently stated in the opinion.

The chancellor dismissed the bill for want of equity, and from his said decree this appeal is prosecuted.

FITTS & STOUTZ, for appellants.—There was no active duty put upon the trustee, and the trust was but a naked or self executing trust, which under the statutes, would at once have vested the legal title in the *cestuis que trustent* but for the necessity of the trustee holding the title to determine who are the children who will take at the death of Mrs. Berry.—*McBayer v. Cariker*, 64 Ala. 50; *Gindrat v. Western Railroad Co.*, 96 Ala. 165; *Jordan v. Phillips*, 126 Ala. 561.

In any event the deed never contemplated that the trust should last longer than the time when the children should attain their majority. It had then effected the full purposes of the trust and that being the case the trust was at an end.—*Gosson v. Ladd*, 77 Ala. 231; *Schaffer v. Lavretta*, 57 Ala. 16; *Cherry v. Richardson*, 120 Ala.

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FREDERICK G. BROMBERG, *contra*.—There is no equity in the bill because it seeks an accounting from the appellee, as an executor of the trustee of an express trust, wholly because of his executorial office, in the face of the statute, now in force since the Code of 1852, which positively forbids the devolution of trust property upon the executor by virtue of his executorial office.—Code of 1896 Sec. 1044; *McDougal's Admr. v. Carey*, 38 Ala. 320; *Read v. Rowan*, 107 Ala. 346.

The appellants expressly assert that the trust expired when their mother died, and that the legal title to all the property and its proceeds thereafter vested in them, and such being the case what standing have they in a court of equity. Again they have expressly renounced and disclaimed all equitable rights. Their remedies are therefore in a court of law, and nowhere else.

ANDERSON, J.—The bill was filed by the complainants against the respondent, Bromberg as the executor of Cecil Carter, deceased. Respondent demurred to the bill and also moved to dismiss for want of equity. The chancellor sustained the motion to dismiss and from which said ruling this appeal is taken. The bill seeks to have the said executor, Bromberg, account for certain funds collected by his testator as trustee for the complainants, and also asks for a construction of a certain trust deed, which is set out in the bill and prays to have the trust thereby created, terminated and declared non-existent. It appears that Alice H. Berry, wife of W. S. Berry, owned considerable property in the city of Mobile which she inherited, as is recited in said trust deed. On October the 2nd, 1883, the said Alice and her husband conveyed to one, Cecil Carter, respondent's testator, said property. The habendum clause of said deed being as follows, to-wit: "To have and to hold the above described real estate, upon the following terms and for the following uses and purposes and no other. That is to say that Cecil Carter is hereby constituted trustee of said Alice E. Berry, her husband, William A. Berry joining in the conveyance for that purpose. To hold said property herein described for the use and benefit of

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said Alice E. Berry, wife of William A. Berry, and during the term of her natural life, and for the benefit of her children during their natural lives. The income to be derived from said property in the way of rents after all expenses of insurance, taxes and other legal assessments are deducted from the same, only to be used for that purpose and after the death of said Alice E. Berry, the said real estate to be held in trust for the benefit of the children of the said Alice E. Berry. It is hereby covenanted that the said real estate shall not be sold by said trustee Cecil Carter, he holding the same for the benefit of the said Alice E. Berry during the term of her natural life, and after her death in trust for the benefit and use of the children of said Alice E. Berry."

The bill avers that complainants are the only children and sole heirs of said Alice Berry, and are each over the age of twenty-one years. That their mother died in May, 1895, and that the trustee Carter died in June, 1903. The bill further avers that the said Bromberg came into the possession of certain funds belonging to them, in his executorial capacity.

If the trust has expired, or was never in fact more than a dry or naked trust, the complainants do not need the aid of the chancery court.—*Jordan v. Phillips, et al.*, 126 Ala. 561.

In construing said trust deed, we must bear in mind the statute on the subject. Section 1020 of the Code of 1896, requires that all conveyances of land be construed as fees unless expressly limited. Section 1027, provides for the vesting of the legal estate in the beneficial owner in certain instances. Section 1028, makes certain exceptions to the rule as set out in the preceding section.

If this case falls under § 1027, the trustee never had the legal title. If under § 1028, did he have the legal title and if so has it just terminated? The foregoing statutes seem to have been derived from the revised statutes of New York and to have been adopted by us as far back as 1852, and Justice Stone very clearly discusses their purpose and application in the case of *You v. Flinn*, 34 Ala. 409.

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The deed in question does not in express terms charge the trustee with the discharge of any duties whatsoever, and indicates that he is but a dry trustee, named only as a depositary for the legal title.—*Hunington v. Spear*, 131 Ala. 414; *You v. Flinn*, 34 Ala. 409; *Tindal v. Drake*, 51 Ala. 574; *Wilkinson v. May*, 69 Ala. 33; *Jordan v. Phillips*, 126 Ala. 561. The deed was executed in 1883, and under the law then of force, this property was her separate statutory estate. Her husband was entitled to the rents and profits. The corpus was liable for family necessities and the husband also had a life estate therein if she died intestate. She doubtless desired to get rid of his trusteeship and secure the income from said property to herself and children and to use the trustee as a medium through which the husband's marital rights should be divested. She was joined in the conveyance by her husband and the deed recites his "repeated declarations of willingness to join in the same," indicating that she was cognizant of his rights in the property, and giving notoriety to the fact that he was wishing to relinquish them. If, however, the trustee was charged by implication with the control and management of the property and was not naked trustee, when did or when will the duties cease and when will the trust terminate?

It is clear from the averments of the bill that Mrs. Berry and her husband are both dead; that the two complainants are her children and only descendants, and that they are now the sole owners of the property and that there are no duties to be performed by a trustee. Mr. Justice Clopton, in *Doe ex dem Gosson, v. Ladd*, 77 Ala. 231, quotes from Perry on Trusts, § 320: "Where an estate is given to trustees, and their heirs, in trust to pay the income to A, during her life, and at her decease to hold the same for the use of her children, or her heirs, or for the use of other persons named, the trust ceases upon the death of A, for the reason that it remains no longer an active trust; the statute of uses immediately executes the use in those who are limited to take it after the death of A., and the trustee ceases to have any thing in the estate,—not because the court had abridged their estate to the extent of the trust, but because, having the

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fee or legal estate, the statute of uses has executed it in the *cestui que trust*," and approvingly says, "The policy and purpose of the statute are to remedy the evil and inconvenience of a separation of the legal and equitable estates, and to consummate their merger, as soon as such union is practicable, consistently with the intention of the grantor, as expressed in the conveyance." See, also, *Cherry v. Richardson*, 120 Ala. 250, and cases there cited.

The decree of the chancellor dismissing the bill for want of equity is affirmed.

Affirmed.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

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Bill in Equity for Injunction.

1. *Common carrier; when shown; discrimination in use of track; injunction.*—Where a railroad company operates a track lying adjacent to business houses, which is not one of its regular side tracks, but is known as a "house track," and for several years continuously serves the persons occupying the business houses located along said track, by delivering at their respective places of business, cars of freights and cars to be freighted and shipped, such railroad company becomes thereby a common carrier with respect to the use it has made of said track, and as such common carrier it is under obligations to treat the public without unfair discrimination; and one of the owners of business conducted along said track can maintain a bill in equity to enjoin said railroad company from making unlawful and unjust discrimination against him by discontinuing serving him by placing cars for him on said track, while furnishing cars to others along the same track.
2. *Equity pleading and practice; new matter in answer not considered on motion to dissolve injunction.*—On a motion to dis-

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solve an injunction on the denials of the answer, the court's consideration is confined to matters which are in denial of the averments of the bill; and new matter averred in the answer by way of defense will not be considered.

APPEAL from the City Court of Birmingham, in Equity.

Heard before the Hon. CHARLES A. SENN.

The bill in this case was filed on May 16th, 1903, by the appellants, W. C. Agee and E. W. Rucker, partners doing business under the firm name of W. C. Agee & Co., against the Louisville & Nashville Railroad Company and the South & North Alabama R. R. Company. It was averred in the bill that the complainants were wholesale dealers in grain, flour, hay and feed stuffs; that their said business was carried on in a storehouse constructed for that purpose, situated on the corner of Morris Ave. and 24th street, in the city of Birmingham, near Railroad Avenue, in said city; "that practically all of their freight is received in carload lots from a railroad track which lies adjacent to said building, and their freight is shipped in carload lots, which is loaded upon cars placed upon said track; that this track which is built adjacent to the complainant's storehouse, was built by the Louisville & Nashville R. R. Co. and was one of what is known as "house tracks," which have been constructed by the Louisville & Nashville R. R. Company and other railroad Companies in the city of Birmingham for the purpose of facilitating the handling of freight in carload lots, which is shipped to and from the wholesale merchants of said city; "that the receipt and delivery of freight by the Louisville & Nashville R. R. Co. to its customers adjacent to said house tracks have become an important feature of its business as a common carrier." The bill then contains the following averments: "That more than fifteen years ago respondent Louisville & Nashville Railroad Company constructed a railroad house track over and along a strip of land adjoining Railroad Avenue immediately adjacent to the lot on which orator's store house mentioned in Sec. 2 of bill is located, in said city, connecting the same with one of its other

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tracks on said Avenue by means of which track so constructed said railroad company proposed to serve a number of patrons whose property abutted said Railroad Avenue in like manner as that on which orator's house is situated; that during all of said fifteen years said respondent, railroad company, has continuously and without interruption operated its cars and trains over said house track serving its patrons, including the owners of the lot upon which said store house is situated, whose property abutted said Avenue, by allowing them to receive and discharge their freight to its cars from their several places of business; that valuable houses have been constructed along said house track since the location of the same, the owners of the same being induced to locate them as aforesaid on account of the location of said track by said respondent and its operation of its trains over the same as aforesaid; that large and important business interests have been established and grown up on lots situated along said track; not only the success but the very life and existence of which depend upon the continuous future operation of said railroad cars over said track in substantially the same manner as they have been operating in the past. Orators further charge that railroads operating house tracks as above stated in this city and section have served their patrons whose places of business were located on the same by using such house tracks for switching purposes in that they have delivered to their patrons all cars consigned to them coming over any and all railroads and delivering for their said patrons by means of said house track all other railroads' cars destined to points on any and all railroads; that the custom to use house tracks as heretofore charged by railroads in this city and section has grown to be and is now a well established custom among them as common carriers; that by the long continued custom established by the railroads they have become and are common carriers over such house tracks for their patrons whose places of business are situated thereon; that the respondent, Louisville & Nashville Railroad Company has, in common with other railroads entering Birmingham, by

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long and continuous usage and custom, continuing for more than twenty years, made itself a common carrier of freights over its house tracks to persons whose business is situated on such house tracks. Orators further aver and charge that respondent, Louisville & Nashville Railroad Company has by constructing and building its said house track on which orators store house is situated and by maintaining and operating the same, by serving its patrons whose places of business are situated thereon, continuously, for more than fifteen years by furnishing them cars on said track at their several places of business, for the purpose of receiving and discharging their freights, has constituted itself a common carrier of freights over said track for orators and others, whose places of business are situated thereon. And respondent, South & North Alabama R. R. Company has, by permitting the Louisville & Nashville R. R. Company to so contract and operate said track, become a common carrier over said track for orators and persons whose places of business are situated thereon."

"Orators further charge that respondent Louisville & Nashville R. R. Co. has since it constructed said house track been serving your orators and other patrons whose property abutted on said track by furnishing them service over said track by delivering to them cars of freight at their respective places of business on said track either coming over its own lines or over the lines of other carriers connected with it in said city and by furnishing them with empty cars at their respective places of business to be loaded by them whether said cars came over its own line or the lines of connecting carriers in said city, and deliver said cars when loaded to its main line when so destined, or to connecting carriers in said city when intended for such connecting carriers until the 7th day of the present month. That since said last-named date while said railroad company has furnished its other patrons on its said line service as it has heretofore done, it has wholly failed and refused in any way to serve your orator on said line, except to deliver one or two car loads of freight which had been ordered to be placed at their place of business before the said last named date.

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Orators further charge that said railroad company declared its intention in future not to serve your orators in any way whatever over said line, notwithstanding it is now and has been since said 7th inst., and in future proposes to serve its other patrons on said line as it has heretofore done and as is usual to serve such patrons on such lines. Your orators charge that said railroad company has no right or lawful excuse for thus discriminating against it by denying it service on equal terms with its other patrons on its said track; that such discrimination is unlawful, unjust and arbitrary and if persisted in will entirely destroy your orators' business and render valueless or nearly so the business house which it has constructed on its lot aforesaid, as it will be impracticable, in fact impossible for it longer to continue in business in said place, if said discrimination is allowed to continue. That some of the business firms on said track in whose favor such discriminations are being made are engaged in the same kind of business as your orators, and are your orators' rivals in business. Your orators charge that they have offered to pay said Louisville & Nashville R. R. Co. such compensation for the service on said house track as they have heretofore paid for like service, and as their rivals and other business concerns located on said house track are now paying for such service. In fact, orators have offered to pay any reasonable charge for such service as said railroad company might demand. Yet, notwithstanding this offer and notwithstanding it has been informed of the loss and ruin of orators' business, said railroad company persists in its refusal to serve orators as it has heretofore done and it is now doing for other persons and business concerns located on said track. Your orators further charge that the respondent South & North Alabama Railroad Company under the franchises granted to it by the State of Alabama is required to serve orators over said track as other persons and business concerns located on said track are being served either by itself or by the said Louisville & Nashville R. R. Co. to which it has committed the operation of its road and into whose hands it has placed its

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property and which it is permitting to exercise the franchise granted to it by the State of Alabama to operate its railroad therein."

There were other averments in the bill, that by the refusal of the Louisville & Nashville R. R. Co., which was operating the South & North Alabama R. R. Co., to deliver cars to the complainants upon said track, the complainants suffered irreparable and incalculable damage in their business, and if the respondents were allowed to continue the unlawful, unjust and arbitrary discrimination, the complainants' business would be utterly destroyed. The complainants also offered to pay the Louisville & Nashville R. R. Co. whatever compensation is reasonable and just for the performance by it for the service asked of it to be performed for complainants in furnishing them with service on said track.

The prayer of the bill was that an injunction be issued, directed to each of the respondents, their servants, agents and employees having charge of the operation of said railroad in the city of Birmingham, directing them to refrain from withholding from complainants the service which had theretofore been accorded them in connection with their business, by furnishing them with cars containing freight and with cars in which freight was to be shipped. There was a temporary injunction issued. The respondents filed an answer, in which, among other things, it is averred that the house track referred to in the bill was constructed over land which belonged to persons other than the respondents; that the owners of said land paid for the construction of said track, and said track has ever since its construction been claimed by the owners of the land upon which it is constructed, which claim of ownership is acquiesced in by the respondents. It was then averred in the bill that the track mentioned therein "as the one on which complainants warehouse is situated is not on the property of either of respondents, nor is it claimed or owned by them, but is the property of private individuals who own the lands on which said track is situated and who have always maintained said track at their own expense. Respondents admit that over said track it has served a number of patrons on

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whose property the said track was situated and among them complainants, and that since the construction of said track it has continuously and without interruption placed cars on said track for the purpose of serving its patrons including the owners of the lot on which complainants warehouse is situated, and upon whose property said track is located, allowing them to receive and discharge freights to and from its cars from their several places of business. Respondents admit that the complainants' warehouse and the structure formerly owned and occupied by the Birmingham Compress Company, but now occupied by the Alabama Mill & Elevator Company, are constructed along said track and deny that any other buildings or structures are or have been located along the same and aver that said track is constructed on the property belonging to the owners of the land on which these buildings are constructed and that said track was constructed by or for the owners of such buildings and lands. Respondents have no knowledge of what induced the owners of said land to locate and construct said buildings and for want of information deny that they were so induced to locate on account of said location of said track or the operations of respondents' trains over same, and respondents deny that said track was located by them, or either of them, but was so located by the respective owners of the lands on which it is constructed."

In said answer, the Louisville & Nashville R. R. Co. also denied that by long and continuous usage and custom, it had "made itself a common carrier of freights over its house tracks or those of private individuals connected therewith to persons whose places of business are situated on such house tracks, or on the tracks of private individuals." The other facts averred in the answer are sufficiently stated in the opinion.

The respondents made a motion to dissolve the temporary injunction upon the grounds that there was no equity in the bill, and upon the denials of the answer. On the submission of the cause upon this motion a decree was rendered, sustaining the motion, and ordering the temporary injunction theretofore issued, dissolved.

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From this decree the complainants appeal and assign the rendition thereof as error.

FRANK S. WHITE & SONS, for appellants.—“Railroad Companies are quasi public corporations created for the purpose of exercising the functions and performing the duties of common carriers and these duties are defined by law, and accepting their charters they necessarily took with them all the duties and liabilities annexed; and they are required to supply to the extent of their resources adequate facilities for transaction of all business offered, and to deal fairly and impartially with their patrons.”—Hutchinson on Carriers, Section 297, *et seq.*, *L. & N. R. R. Co. v. Pittsburg, etc., Coal Co.* (Kentucky) 23 Am. & Eng. R. R. Cases, new edition page 332; *McCoy v. Railroad Company*, 13 Federal 5; *Mumm v. Illinois*, 94 U. S. 126. A railroad operating a spur-track cannot plead as an excuse for its failure to serve all its patrons on said track alike, that its right of way over said track was granted it on conditions that it would give advantages to the person granting the right of way not given to others on said track.—*L. & N. R. R. Co. v. Pittsburg etc. Coal Co.*, *supra*; *Houston & T. C. R. R. v. Smith*, 22nd Am. & Eng. R. R. Cases, (old edition) page 421.

Those engaged in the carrying trade can become common carriers by virtue of the attitude they assume to the public even where they otherwise would not be, and they are estopped from denying that they are when proceeded against as such. Having assumed the relation as common carriers they cannot discriminate as between their patrons but must treat all alike.—5 Am & Eng. Enc. of Law 177, Section 4; *New England Express Company v. Maine Central R. R. Co.*, (Maine) 2nd American Reports 31; *Wheeler v. San Francisco R. R. Co.* (California) 89 Am. Decisions 147; *Messenger v. Penn. R. R. Co.*, (New Jersey) 18th Am. Reports 754; *Kenney v. Grand Trunk R. R.*, 47th New York 525.

Even if the owner of the track objected to its use in serving appellant it would be no excuse for its failure to serve them.—*Louisville & Nashville R. R. Co. v. Pitts-*

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burg etc. R. R. Company, 23rd Am. & Eng. R. R. Cases, (new edition) 332.

J. M. FALKNER, GEORGE W. JONES and W. I. GRUBB, *contra*.—As to switched cars from connecting lines, where no transportation service is involved, but only a switching or transfer service, as distinguished from the former, the appellees do not act as common carriers, cannot be compelled to perform such service and cannot be guilty of unlawful discrimination in performing it for one individual or connecting road, while declining to do so for another.—*T. & N. O. R. R. v. Gulf & Interstate R. R. Co.*, 54 S. W. Rep. 1031; *T. & N. O. R. R. Co. v. Gulf & Interstate R. R. Co.*, 56 S. W. Rep. 328; *Dixon et al v. C. of G. Ry. Co.*, 35 S. E. Rep. 369.

The injunction should have been dissolved. The answer contained a sufficient denial of the charge of unjust discrimination. The bill charges, not alone discrimination, but unlawful and unjust discrimination, and the burden of proving this charge was on appellants. A denial of the charge in the answer, if sworn to, made on knowledge and unequivocal, would avail to dissolve the injunction. It is true that the denial should be of the facts alleged to constitute the unlawfulness and injustice of the discrimination, and not of the unlawfulness and injustice of it as a mere conclusion.—*C. & W. R. R. Co. v. Witherow*, 82 Ala. 194. This is true when the complainant avers any facts in his bill of complaint on which he predicates the conclusion of unlawfulness and injustice of the discrimination. Appellants here set out no facts in their bill to support the charge of unlawful and unjust discrimination, which is charged as a conclusion. The bill charges both the discrimination and its unlawfulness. The answer admits the discrimination and denies its unlawfulness by setting out the facts and reasons which it is claimed make it lawful. The discrimination could only be unlawful where the parties discriminated in favor of and against were similarly situated, and where there was no good reason for it. The purport of the facts set up in the answer is to show

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that the appellants and other shippers on the track in question were not similarly situated in, that one refused to pay demurrage while the others paid it promptly, and to show the reasonableness of the car service rule under which non-paying shippers were discriminated against in deliveries on private tracks. This is in denial of the charge in the bill that the discrimination was without valid excuse and unlawful and is directly responsive to it.—*Youle v. Richards et al.*, 1 N. J. Equity, 534. So in denying the charge of unlawful discrimination appellees have the right to state the whole transaction and facts so stated are responsive to the material allegation of unlawful discrimination.—*Cornelius et al. v. Post et al.*, 9 N. J. Eq. 196; 10 Am. Encyc. Pleading & Practice, 1072.

PER CURIAM.—Complainants are wholesale provision dealers conducting business in a house near Railroad Avenue in Birmingham, and have been receiving and shipping away goods over a railroad track located adjacent to that house, and operated by the defendant, the Louisville & Nashville Railroad Company. For some years next before the 7th day of May, 1903, that company had continuously served persons having business houses located along that track, by delivering at their respective houses cars of freight and cars to be freighted and shipped, and had so served complainants from the spring of 1902 to the 7th day of May, when, having a few days theretofore given notice of its intention to do so, it discontinued that service to complainants but continued furnishing it to others along that track. Besides other facts set forth in the bill the foregoing are alleged and are not denied in the answer except as to the capacity in which the railroad company operated the track referred to. As to that, the answer avers the track was owned by and was on lands of complainants and persons other than defendant, and that the car service thereon was not rendered by the railroad company as a common carrier.

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One theory upon which complainants seek relief is that the alleged refusal of car service, constitutes unlawful and injurious discrimination. Assuming the truth of the bill, that theory is well founded. The facts alleged in the bill and not denied in the answer show the Louisville & Nashville Railroad Company was a common carrier with respect to the use it made of the track in question. As a common carrier it was under obligation to treat the public without unfair discrimination. In the answer it is averred, in substance, that before and when the car service was refused, complainants owed, and had refused payment of, a debt, to the Louisville & Nashville Company accruing for detention of cars and that by reason of this fact, together with a rule of a car service association whereunder that, and other railroad companies were operating, the discontinuance of car service to complainants was authorized. This is new matter within the meaning of the rule which on the hearing of a motion to dissolve an injunction on answer made confines the court's consideration to matters which are in denial of the bill's averments. To now determine whether this new matter can be availed of to prevent relief on final hearing would be inappropriate. The bill has equity and apart from new matter set up in the answer, no defense is shown. We are of the opinion that the injunction should be retained until the further hearing of the cause and will order that this be done, and that the decree of dissolution be reversed, and the cause remanded.

Reversed and remanded.

[Alford *et al.* v. Hicks.]

Alford *et al.* v. Hicks.

Bill to Restrain Acts under an Alleged Unconstitutional Law.

1. *Constitutional law; passage of local law.*—The Legislature of Alabama cannot enact a constitutional local law without violating Section 106 of the Constitution, when the notice of the intention to apply therefor, as required by said section, shows that the Act proposed to be enacted, if enacted as set forth in the notice, would be unconstitutional.
2. *Same; act to establish inferior civil court of Mobile County unconstitutional.*—The act of the Legislature of Alabama approved September 26th, 1903, entitled "An Act to establish an inferior civil court of Mobile County in lieu of Justices of the Peace for the City of Mobile," (Local Acts 1903, pp. 348-352), is unconstitutional and void, because the notice required by Section 106 of the Constitution to be given stated that the court proposed to be established should have jurisdiction to the extent of \$200.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

The bill in this case was filed by appellee as a resident citizen and tax payer of Mobile county, Alabama, to enjoin the paying out by the County Treasurer of moneys for stationery, books and supplies for the Inferior Civil Court of Mobile County, and to enjoin the payment out of the County Treasury of the salaries provided for in said act to be paid to the Sheriff, to the Judge, and to the *ex officio* clerk of the said Court.

The bill also shows that the appellee is a duly elected and qualified Justice of the Peace of ward one of Mobile County, Alabama; that as a result of the approval of the Act published in the Local Acts of 1903, to establish an inferior civil court in Mobile County in lieu of Justices of the Peace in the City of Mobile, and the assumption of power thereunder by the acting officers of said

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Court, the appellee has lost all his business as Justice of the Peace of said ward one, to his inestimable and irreparable damage.

The Act as enacted contained in detail the provisions, the substance of which was set out in the notice, with the exception that in the act as passed by the Legislature, the jurisdiction of the inferior court was limited to \$100 and not to \$200, as stated in the notice. The grounds upon which it was averred in the bill that the act in question was unconstitutional, was that the notice which was given of the intention to introduce such bill was not sufficient notice as required by Section 106 of the Constitution of 1901; that the Journal of the House of Representatives and the Journal of the Senate of the Legislature do not show affirmatively that said act was passed in accordance with the provisions of Section 106 of the Constitution of 1901.

The defendants demurred to the bill upon the following grounds: "1st. Because the act of the Legislature alleged in said bill to be invalid is shown by the Journals of the House and Senate of the Legislature of Alabama to have been passed in strict compliance with the Constitution of the State of Alabama. 2nd. Because the notices of the purpose to introduce the said act, alleged in said bill to be invalid, as set out in the Journals of the House and Senate of the Legislature of Alabama, show that the publication was made and that the notice required by the Constitution state the substance of said act as the same was passed by the Senate and House of Representatives of the Legislature of Alabama. 3d. Because that part of said act complained of in said bill which established an inferior Civil Court for the County of Mobile in lieu of Justices of the Peace was adopted in strict compliance with the Constitution of the State of Alabama and is separable from all other parts and provisions of said act."

Upon the submission of the cause upon the demurrers, the Chancellor rendered a decree overruling the demurrers. From this decree the defendants appeal and assign the rendition thereof as error.

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GREGORY L. & H. T. SMITH, for appellants.

CHARLES L. BROMBERG and MASSEY WILSON, *contra*.—The substance of the bill which passes the Legislature is what the Constitution requires should be published. *Lancaster v. Gafford*, 37 So. 108 and of decisions; *Wallace v. Board of Rev. etc.*, 37 So. Rep. 321; *Tillman v. Porter in MS.*

TYSON, J.—The bill in this cause assails the constitutionality of the act entitled “An act to establish an inferior civil court of Mobile county in lieu of justices of the peace in the city of Mobile.” Local acts 1903, p. 348, No. 265.

It is practically admitted by the appellants, who were the respondents in the court below that the act is a local one. The main question presented is whether the notice that was given as required by section 106 of the Constitution was sufficient.

That notice reads as follows: “Notice is hereby given that a bill to establish an inferior civil court for the county of Mobile, with inferior jurisdiction, in lieu of the justices of the peace, except said court shall have jurisdiction to the extent of two hundred dollars, will be introduced at the present session of the legislature, making the judge and clerk of the inferior criminal court of Mobile county, ex officio judge and clerk of said inferior civil court of Mobile county, and providing appropriate compensation for said officers. All of the costs and fees collected in said court, except the sheriff’s fees, to be turned into the county treasury.”

Section 168 of the Constitution authorizing the general assembly to provide for inferior courts in lieu of justices of the peace reads as follows: “In each precinct lying within or partly within, any city or incorporated town of more than fifteen hundred inhabitants, there shall be elected by the qualified electors of such precinct, not exceeding two justices of the peace and one constable. Where one or more precincts lie within or partly within a city or incorporated town having more than fifteen hundred inhabitants, the legislature may provide

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by law for the election of not more than two justices of the peace and one constable for each of said precincts or for an inferior court for such precinct or precincts, in lieu of all justices of the peace therein. Justices of the peace and the inferior courts in this section provided for, shall have jurisdiction in all civil cases where the amount in controversy does not exceed one hundred dollars, except in cases of libel, slander, assault and battery and ejectment," etc.

This section was adopted in the stead of Section 26 of Art. 6 of the Constitution of 1875, which required the election of not exceeding two justices of the peace in each precinct of the county in the state and providing that they "shall have jurisdiction in all civil cases where the amount in controversy does not exceed one hundred dollars, except in cases of libel, slander, assault and battery and ejectment," etc.

It will be observed that the language conferring jurisdiction is identical in the two sections.

In *Pearce v. Pope*, 42 Ala. 319, it was said of the provision above quoted that its object "was not to confer power upon the Legislature, nor to vest jurisdiction in justices of the peace, nor to provide for its exercise. It was to place a *restriction* upon the legislature in conferring the jurisdiction—to provide a maximum as to its extent."

In *Taylor v. Woods*, 52 Ala. 474, it was held that this section of the Constitution was not an express grant of civil jurisdiction to justices of the peace but was intended to limit their jurisdiction to controversies involving a sum not exceeding one hundred dollars.

The same principle was announced in *Carter v. Alford*, 64 Ala. 236. On the authority of these cases it is clear that the Legislature, under the Constitution of 1875, could not have constitutionally conferred upon justices of the peace jurisdiction in civil cases in excess of the maximum amount provided.

This being the settled interpretation of the language employed in § 26 quoted above, the incorporation of the same language in § 168 of the present Constitution must be regarded as an adoption of that interpretation. For

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the framers of the present Constitution must be presumed to have retained it with knowledge of that construction; and the courts will, therefore, feel bound to adhere to that construction. *Ex parte Roundtree*, 51 Ala. 42; Endlich on Interpretation of Statutes, § 530.

Whether § 168 is a grant of power to the legislature to establish the inferior courts mentioned in it is not necessary here to be decided. But it is entirely clear that it is a limitation upon the power of the legislature to confer upon these courts, when established, jurisdiction in excess of one hundred dollars, and an act, if passed, conferring jurisdiction for a greater sum would be unconstitutional. But it may be said that the act assailed does not attempt to confer jurisdiction in excess of the constitutional limitation. This is true. But the notice given was to have a law enacted that would have done so. So then, the question is, can the legislature enact a constitutional local law, without violating § 106 of the Constitution, when the notice of the intention to apply therefor, as required by that section, shows that the act proposed to be enacted, if enacted, would be unconstitutional? We think not.

That section provides that "no special, private or local law shall be passed on any subject not enumerated in Sec. 104 of the Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the State in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law," etc., etc.

Manifestly, the purpose here sought to be accomplished was to inform the people of the county or counties to be affected by the law, of its proposed enactment, so that those of them who may not favor its enactment might oppose it. To hold that under the notice here under consideration that a valid law may be passed by the Legislature, would not only violate the letter and spirit of § 106, but would practically emasculate it.

The people of Mobile county knew that no such law as mentioned in the notice could be legally passed. They

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had a right to rely upon the legislature not violating the constitution, or if it did, they knew the act would be void and they could not possibly be effected by it. They might have been thus lulled by the notice into feeling that there was no need to oppose its passage. They had no notice of the act that was passed. We feel constrained to hold that the notice was wholly insufficient—in fact, no notice at all of that act that was passed.

The demurrer to the bill in the case was properly overruled.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concur.

Bronson v. Russell.

Action of Detinue.

1. *Conditional sale; when shown to exist.*—Where an agreement of purchase of personal property, after reciting that the property was purchased at a certain price, which was to be paid, part in cash and for the balance notes were given, then recites that if the purchaser failed to pay either of said notes when due, the seller may retake the property sold and all payments thereon shall be retained as rent, and that the title to said property is retained by the seller until full compliance with the terms of said agreement, such agreement constitutes a conditional sale, and the seller is not divested of title until there is a payment of the purchase price.
2. *Principal and agent; contract in name of principal.*—If a contract which is made with an agent discloses his principal and it appears on the face of the paper that the contract is really made on behalf of the principal, although it is signed by the agent as agent, such contract is one for the principal and not by the agent in his own behalf.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This was a statutory action of detinue, brought by the appellant against one C. H. Kreuger to recover certain
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personal property specifically described in the complaint. The original defendant, Kreuger, filed a disclaimer of ownership of any interest in the property, and suggested that the property sued for belonged to one Anna Russell. Mrs. Russell was then on her own petition made a party defendant to the suit. The plaintiff claimed title to the property as transferee of the bill of sale to said property. This bill of sale was executed on Jan. 9th, 1902, by C. H. Kreuger to Frank H. Thrall, and was transferred by said Thrall to the plaintiff on Jan. 9th, 1902, said Thrall endorsing such assignment of the bill of sale.

On July 30th, 1901, the property involved in the suit was sold to Frank H. Thrall and Charles H. Kreuger, and at the time of the sale there was a written instrument executed by these parties. This instrument recited as follows: "This claim witnesseth: That we have this day received from L. Klein, Agt. for Mrs. Rosa Klein, the following personal property, to-wit: (There then followed a description of the property sued for in the present suit and a statement that they agreed to pay \$395.00 for the same, in the following manner:) \$120.00 cash, and \$27.50 on the 1st, of September, 1901, and \$27.50 on the 1st of each month thereafter, until paid, as evidenced by our ten promissory notes of even date herewith.

"If we fail to pay either of the said notes when due, or attempt to remove or dispose of said property, without the consent of said Leo Klien, Agt., for Mrs. Rosa Klein, the said L. Klien, Agt., may retake the same wherever found and all payments made thereon shall be retained as rent therefor, and the title to said property being retained by L. Klien, Agt., for Mrs. Rosa Klien, until a full compliance of the terms of this agreement."

This agreement was signed by Frank H. Thrall and Charles H. Kreuger and dated July 30th, 1901, and was endorsed as follows: "For value received, I hereby transfer the within mortgage and notes to Mrs. Anna Russell without recourse on me this February 4th, 1902. (Signed) Leo Klein, Agt." This agreement was filed for

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record in the office of the Judge of Probate on Feb. 3d, 1902.

There was also introduced in evidence several of the notes referred to in said agreement, which had been assigned to Anna Russell, and which had not been paid. The plaintiff objected to the introduction of evidence of the agreement of purchase and the notes, upon the ground that the mortgage was not recorded until after the purchase of the plaintiff, and that they were incompetent and irrelevant evidence. The court overruled the objection, and to this ruling the plaintiff duly excepted.

The cause was tried by the court without the intervention of the jury, and upon hearing all the evidence the court rendered judgment in favor of the defendant, to the rendition of which the plaintiff duly excepted. The plaintiff appeals and assigns as error the rulings of the trial court to which exceptions were reserved.

CHARLES P. JONES and W. F. THETFORD, JR., for appellant.—Cited *Jones v. Morris*, 61 Ala. 518; *Taylor v. A. M. Association*, 68 Ala. 229; *Hall v. Cockrell*, 28 Ala. 507.

No counsel for appellee.

DOWDELL, J.—The sole question presented by the record in this case for our consideration, is whether the written instrument offered in evidence by the defendant for the purpose of showing title in herself to the property in question, was a conditional contract of sale. That the title to the property was originally in Mrs. Rosa Klein was without dispute, and the same is true as to the agency of L. Klein. These facts taken in connection with what the contract disclosed on its face, were sufficient to show that L. Klein was acting for Mrs. Rosa Klein in the making of the contract, and of the endorsement on the same.—*Richmond Locomotive & Machine Works v. Moragne*, 119 Ala. 80. The agent had no title, the reservation, therefore, was to his principal in whom

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the title resided. No title to the property was to pass under the sale except upon the performance of the conditions named in the contract. The sale was a conditional one. The conditions of the sale were not performed, and the title remained in Mrs. Klein until she conveyed to the defendant. The transaction occurring in the county of Montgomery, under the local statute, (Local Acts, 1898-99, p. 1120), the record of the contract of conditional sale was not necessary to its validity. The title to the property never having passed from the vendor to the vendee under the conditional sale, and the defendant succeeding to the title had the superior claim and right to the property.—*Sumner v. Woods*, 67 Ala. 139.

We find no error in the record, and the judgment will be affirmed.

Affirmed.

MCCLELLAN, C. J., HARALSON and DENSON, J.J., concurring.

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*Bill in Equity by Surety to enjoin the collection of
Judgment.*

1. *Surety; right to enjoin collection of judgment pending suit against principal.*—Suit was brought against a surety upon a bond for the faithful performance of a contract entered into by the principal with the plaintiff. The plaintiff obtained judgment on which execution was issued. Subsequently the same plaintiff instituted a suit against the principal in the bond for the breach of the contract for the performance of which the bond was given. The defendant in the last suit interposed defenses by setting up pleas in bar. Thereupon the surety against whom the judgment had been recovered filed a bill against the plaintiff to enjoin the collection of the judg-

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ment against it, until the final adjudication of the suit by said plaintiff against the principal in the bond, in which bill it was averred that the pleas at bar introduced by the principal were true. There were averred no general grounds of equitable jurisdiction to enjoin the collection of the judgment. *Held*: that the surety could not maintain such a bill to enjoin the collection of the judgment.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

The bill in this case was filed by the appellee against the appellant and others. The facts of the case are sufficiently stated in the opinion.

GREGORY L. & H. T. SMITH, for appellant.—The creditor cannot be compelled to exhaust his remedy against the principal debtor before resorting to the surety is settled in the very early history of this State.—*Abercrombie v. Knox, Snodgrass, et als.*, 3 Ala. p. 729; *Bank of the State of Alabama v. Goden & Lowry*, 15 Ala. 616; *Skinner v. Barney*, 19 Ala. 698.

The bond in this case was not merely for the payment of money, but contained collateral conditions and was not, therefore, subject to the conditions of Sections 3884 and 3885 of the Code. These statutes, however, were only declaratory of the common law.—*Herbert & Kyle v. Hobbs & Fennell*, 3 Stewart p. 9. But whether at common law or under the statute the creditor performs his whole duty when he brings suit against the principal after a notice from the surety.—*Hightower v. Ogletree*, 114 Ala. p. 94; *Darby v. Berney National Bank*, 97 Ala. 643. No notice was given in this case, and even where notice is given, it must be specially pleaded.—*Shehan v. Hampton*, 8 Ala. 942.

MITCHELL & TONSMEIRE, *contra*.—"The contract of suretyship has been defined to be a contract whereby one person engages to be answerable for the debt, default or miscarriage of another. It is an obligation accessorial to that of the principal debtor; the debt is due from the principal, and the surety is merely a guarantor for its

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payment. A corollary from this definition is that it is of the essence of such a contract that there be a valid obligation of the principal debtor.—*Evans, et al v. Keeland*, 9 Ala. 46; *Johnson, et al, v. Ivey*, (Tenn.) 94 Am. Dec. 206; *The State v. Parker*, 72 Ala. 183. "The release of the principal will release the surety, whether it occurs before or after judgment."—*Anthony v. Capell*, 53 Miss. 352; 24 Ency. Law, 1st Ed. 845.

A surety will be discharged even after a judgment against him by the discharge of the principal because of matters inherent in the transaction.—*Michener v. Springfield Engine & Thresher Co.* (Ind.) 31 L. R. A. 59 The extinguishment of a debt of a principal, *no matter how accomplished*, extinguishes the collateral liability of the surety.—*Bridges v. Blake*, (Ind.) 6 N. E. Rep. 833; 24 Ency. Law, 1st Ed., 819; *Municipality No. 2 v. Groning*, 15 La. Ann. 166; *Merrimac Bank v. Parker*, 24 Mass. 88; *Chapman v. Collins*, 66 Mass. 163.

MCCLELLAN, C. J.—It appears from the bill in this case, as amended, that the appellee here was surety upon the bond of Thomas-Bailey Machine Works for the faithful performance of a contract entered into by the principal with the Dampskibsaktieselskabet Habil, a corporation under the laws of the Kingdom of Norway. That corporation on the 19th day of June, 1900, instituted a suit against appellee as surety on the bond and after a contest by the surety, obtained judgment against it for the sum of \$2,381.90, and execution had been issued on the judgment. It further appears that on the 12th day of November, 1900, the Habil Company instituted a suit against members of the firm of Thompson-Bailey Machine Works, the principals in the bond, for the breach of the contract for the performance of which the bond was given. The Thompson-Bailey Company had interposed defenses to the suit, among them *non est factum*; the general issue; that the delay in the completion of the contract was due to extra work, and to the stoppage of the work to await inspection by the inspector of the Company; a plea of set-off to the amount of \$1,603.10, and an unauthorized alteration of the contract

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by the plaintiffs. The prayer of the bill was for an injunction to prevent the collection of the judgment against appellee, as surety, until the final adjudication of the suit of the *Habil Company v. Thompson-Bailey*, the principals. On the 14th day of December, 1903, an injunction was issued as prayed. Subsequently a demurrer was sustained to the bill because it did not allege that the defenses interposed by Thompson & Bailey in the suit against them upon the contract, were true. The complainant then "amended by adding thereto the following affidavit" which was an affidavit by Arthur Bailey that the defenses of Thompson & Bailey were true, and that to the best of his knowledge and belief, Thompson & Bailey would be able to maintain them. The defendant moved to dismiss the bill for want of equity, and refiled the demurrers, containing among other grounds the one which had been formerly sustained. From the decree overruling the motion and the demurrer, this appeal is taken.

Independent of statute, the general rule is that the creditor cannot be compelled to exhibit his remedy against the principal before resorting to the surety.—*Skinner v. Barney*, 19 Ala. 698; *Bank of the State of Alabama v. Goden & Lowry*, 15 Ala. 616; *Abercrombie v. Knor*, 3 Ala. 729. A request, however, to sue the principal operates to discharge the surety when by the negligence of the creditor the means of recovering the debt has been lost or damage has accrued to the surety. It does not appear from the bill that any request to sue the principal had been made, but if such be the fact, and the complainant has been damaged by the negligence of the creditor, this damage was available as a plea in bar in the action against him.—*Howle v. Edwards*, 97 Ala. 649.

When the surety is sued alone, he may notify the principal to defend the suit, and upon the failure of the principal to indemnify him and defend, the surety, upon paying the judgment against him, may in the absence of fraud, recover the amount paid from the principal, whether the principal was actually liable or not.—*Riley v. Stallworth*, 56 Ala. 481.

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The relation of the parties continues, notwithstanding the rendition of the judgment against the surety, and he will be discharged by the same acts after, as before judgment, and where such discharge exists, he may enjoin the collection of the judgment against him.—*Carpenter v. Devon*, 6 Ala. 725.

No fact constituting a discharge of the surety is averred in the bill. The utmost that can be said to aver, is that an action had been instituted by the creditor against the principals; that certain pleas in bar had been interposed by them therein, and that the pleas are true. These facts do not constitute a discharge. In the absence of the general grounds of equitable jurisdiction to enjoin the collection of judgments at law, it cannot be doubted that if no suit had been instituted against the principals, the mere existence of the defenses would not authorize the granting of the injunction of the judgment obtained against the surety. The case would stand upon such averments alone upon a bare right to compel the creditor to exhaust his remedy against the principal before resorting to the surety, a right which has been stated, does not as a general rule exist. The surety in such case would have to show that he was prevented from making the defenses available in the action at law against him, by circumstances not attributable to his neglect nor inattention.—*McGrew v. Tombeckbee Bank*, 5 Porter, 547.

The defences averred are clearly legal, and, while they are meritorious, the bill fails to negative fault upon the part of complainant in failing to make them, and there is an absence of averment of any fraud or any act upon the part of the plaintiff to which its failure to successfully defend can be attributed.

We see no distinction in principle between the hypothetical case of the mere existence of defenses, above stated, and one where they have been incorporated into pleas by the principals in an action against them. Neither would be advisable as a discharge to the surety, and it is only where such discharge exists that the surety can enjoin the collection of a judgment against him as an independent ground of equity jurisdiction.

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It follows that the court below erred in sustaining the equity of the bill. The decree must be reversed and a decree will be here entered dismissing the bill for want of equity.

Reversed and rendered.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Southern Railway Company v. Aldredge & Shelton.

Action against Railroad Company for Failure to Deliver Goods.

1. *Warehouseman; should exercise ordinary diligence.*—A warehouseman is bound to use ordinary diligence in keeping goods intrusted to his charge, which means, he should use such care and diligence as a man of ordinary prudence bestows on his own affairs.
2. *Warehouseman; burden of proof when loss of goods shown.*—If a warehouseman fails on demand to deliver goods intrusted to him, or does not account for such failure, prima facie negligence will be attributed to him, and the burden of proving the loss without the want of ordinary care is devolved upon him.
3. *Action of railroad company as warehouseman; admissibility of evidence.*—In an action against a railroad company as a warehouseman, the distance which the plaintiff lives from the depot of the defendant where the goods were stored, is irrelevant to any issue involved, and therefore testimony as to such fact is inadmissible.
4. *Trial of civil case; not necessary to authorize verdict.*—In the trial of a civil case, it is only necessary in order to authorize a verdict that the jury should be reasonably satisfied; and therefore, a charge which instructs the jury that they must be satisfied to a "reasonable certainty," before they can return a verdict, is erroneous, as exacting too high a degree of proof.

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APPEAL from the Circuit Court of Etowah.

Tried before the Hon. J. A. BILBRO.

The purpose of the suit and the facts of the case are sufficiently stated in the opinion. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "2. If the jury believe all the evidence, they cannot find for the plaintiff in the second count of the complaint." "3. The burden is on the plaintiff to show that defendant was guilty of gross negligence in keeping the goods to a reasonable certainty, and if the evidence is in such a state of confusion and uncertainty as that the jury cannot say that they are satisfied to a reasonable certainty that the goods were lost by the negligence of defendant, then plaintiff is not entitled to recover." "4. If Mr. Aldredge received the goods from the agent and asked the agent to allow them to remain till he could send back for them and when he sent back for them they were not there, this does not make out a case of negligence against defendant or entitle plaintiff to recover." "5. The mere fact, if it be a fact that the shoes were there when Aldredge got the one case of shoes and were not there when he sent for them several days later, is not of itself sufficient to show that defendant was guilty of negligence which brought about the loss of the shoes." "6. The court charges the jury that the uncontradicted evidence in this case shows that plaintiff left the shoes in defendant's depot without a reward and plaintiff is not entitled to recovery unless defendant was guilty of gross negligence in keeping the shoes." "8. The court charges the jury, that the fact that plaintiff lived 27 miles from Attalla, is not to be considered by the jury for any purpose." "9. The court charges the jury, if the jury are not satisfied to a reasonable certainty whether the goods were left with defendant at defendant's risk or at plaintiff's risk the jury cannot find a verdict for plaintiff." "10. The court charges the jury, if the jury are reasonably satisfied that defendant kept the goods in his depot, with reasonable care and that some one staid in the depot in

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the day and kept it locked at night. then plaintiff cannot recover."

At the request of the defendant, the court gave to the jury the following charges: "5. The court charges the jury, the burden is on plaintiff to prove to a reasonable certainty that the goods were lost on account of some negligence of defendant if the evidence as to negligence is so equally balanced as that the jury are not convinced to a reasonable certainty that they were lost on account of the negligence of defendant, then plaintiff cannot recover in this action." "11. The court charges the jury, if the jury believe from the evidence that the goods were kept in defendant's depot with reasonable care, the jury must find a verdict for defendant."

There were verdict and judgment for the plaintiffs. The defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

BURNETT, HOOD & MURPHREE, for appellants.

GEORGE D. MOTLEY and E. D. HAMMER, *contra*.—Cited *Mobile & Girard R. R. Co. v. Prewitt*, 46 Ala. 63; *Cook v. Erie R. R. Co.*, 58 Barber (N. Y.) 312; *M. & G. R. R. Co. v. Pruitt*, 46 Ala. 68; *L. & N. R. R. Co. v. Cowherd*, 120 Ala. 51.

SIMPSON, J.—This was an action by appellees for the value of two cases of shoes, basing their right to recovery on appellant's liability as a common carrier, in the first count, and on its liability as a warehouseman for reward, in the second count of the complaint. The judgment was for plaintiffs for \$30.16.

The undisputed facts of the case are that two shipments of shoes were received for plaintiffs, at Attalla; that when plaintiffs called for them, they could not carry them all, and requested defendant's agent to allow those not carried away then, to remain in the warehouse 'till they could call for them, which was assented to, and when they called for them, the two cases were missing

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and were never found. No charge was made for keeping the goods in the depot, and there was no offer to pay any thing.

Defendant's witness (the agent) states that, when plaintiffs requested him to let the goods remain there, he assented but told plaintiff that the goods would be at their risk. Plaintiff says that he does not remember any such remark being made to him.

The responsibility of a railroad company keeping goods in its depot, after the termination of the transit, is that of a warehouseman for hire, and it is bound to use ordinary diligence in keeping the goods.—*M. & G. R. v. Prewitt*, 46 Ala. 63, 68.

"A warehouseman is only bound to take reasonable and common care of the commodity entrusted to his charge." He is bound to the observance of "ordinary diligence;" such care and diligence as a man of ordinary prudence, bestows on his own affairs.—*Moore v. Mayor etc. of Mobile*, 1 Stewart, 184, 187; *Jones v. Hatchett*, 14 Ala. 743, 745.

The rule of law is that if a bailee, (such as a warehouseman) fails to deliver the goods, intrusted to him, on demand, or does not account for said failure, "*prima facie*, negligence will be imputed to him, and the burden of proving a loss without the want of ordinary care is devolved upon him."—*Seals v. Edmonson*, 71 Ala. 509. The burden is on him to show that the goods "perished," were destroyed, lost or stolen, notwithstanding he had employed ordinary diligence in preserving it.—*Haas v. Taylor*, 80 Ala. 459, 465; *Prince v. Ala. State Fair*, 106 Ala. 341, 346, 347; *Davis v. Hurt*, 114 Ala. 146, 149, 150.

In this case the defendant's agent testifies that the depot in which the goods were kept, was a safe and secure place, and that it was kept locked at night, and also in the day, whenever defendant's employes were not present. This being all the evidence on that subject, we think it was for the jury to determine, whether or not that was ordinary care. Consequently there was no error in the refusal of the court to give charge No. 2 requested by the defendant.

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Charge No. 3, requested by the defendant, was properly refused by the court, as shown by the authorities heretofore cited.

Charge No. 4, requested by the defendant was properly refused. This charge was abstract, there not being any testimony to show that Aldredge "received the goods from the agent." On the contrary, the evidence is clear that said goods never went out of the possession of defendant's agent until they were lost.

For considerations before stated, there was no error in the refusal of the court to give charge 6, requested by the defendant.

There was no error in the refusal of the court to give charge No. 7, requested by the defendant, as shown by the authorities heretofore cited.

The court erred in overruling the objection to the question to Aldredge as to how far plaintiff lived from Attalla, and also in refusing to give charge No. 8, as the distance of plaintiff's residence from Attalla had no legal bearing on the issue involved in this case.

Charge No. 9, requires too high a degree of proof.

The refusal to give charge 10, was cured by giving charges 5 and 11.

The judgment of the court is reversed and the cause remanded.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

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Proceeding to compel Officer to Turn Over Books.

1. *Constitutional law; validity of act establishing inferior court of Bessemer.*—A published notice that "a bill will be introduced in the next session of the legislature of the State of Alabama, to create and establish an inferior court in the city of Bessemer in precinct 33, Jefferson county, with both civil and criminal jurisdiction, as provided by sections 130

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and 158, article 7 of the Constitution of the State," does not state the substance of the local act passed by the legislature establishing an inferior court of Bessemer in lieu of all justices of the peace of precinct 33 (Local Acts, 1903, p. 482); and said act establishing the inferior court of Bessemer is therefore unconstitutional and void.

APPEAL from the City Court of Bessemer.

Tried before the Hon. WILLIAM JACKSON.

The proceeding in this case was instituted by the appellee, W. F. Porter, under Section 3134 of the Code of 1896, to compel the appellant, S. J. Tillman to deliver to the petitioner certain books and papers pertaining to the office of the justice of precinct 33 of Jefferson county, which office was held by the respondent Tillman at the time of and after the passage of an act of the legislature to establish an inferior court in precinct 33 of Jefferson in lieu of all justices of the peace in said precinct. The petitioner pleaded that he had been duly and regularly elected to the judge of said inferior court, and that the respondent refused upon his demand to turn over to him the books and papers formerly used by him and belonging to the office of the inferior court of Bessemer. There were many motions and demurrers interposed, but under the opinion on the present appeal, it is unnecessary to set these out in detail.

The respondent set up by special pleas that the act establishing the inferior court of Bessemer was unconstitutional and void, because said act was a local act within the meaning of the constitution, and that the notice given of the introduction of said act of the legislature was insufficient. The notice referred to was set out in the special pleas, and was in words and figures as follows: "Notice to the Public. A bill will be introduced in the next session if the Legislature of the State of Alabama, to create and establish an inferior court at the City of Bessemer, in precinct thirty-three, Jefferson county, with both civil and criminal jurisdiction as provided by sections 130 and 158, Article 7, of the Constitution of the State."

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Motion was made by the petitioner to strike the special pleas from the file, and the motion was sustained. To such ruling the respondent duly excepted. The cause was tried by the court without intervention of a jury, and a judgment was rendered in favor of the petitioner, ordering the respondent to turn over to the petitioner the books of his office.

The respondent appeals and assigns as error the rulings of the trial court, to which exceptions were reserved.

B. C. JONES, for appellant.—Cited *Lancaster v. Gafford*, 139 Ala. 372; *Wallace v. Board of Revenue Jeff. Co.*, 140 Ala. 491, 37 Sou. Rep. 321.

W. F. PORTER, *contra*.

SIMPSON, J.—Without going into the various points raised by the pleadings, it is evident that the Act of the Legislature (Local Acts of 1903, p. 482) being entitled “An Act to establish, in precinct 33, in Jefferson county, Alabama, an inferior court in lieu of all justices of the peace in said precinct, to be known as the Inferior Court of Bessemer, to define the jurisdiction and powers of said court and the judge thereof,” approved October, 1st, 1903, is void, by reason of a failure to comply with the provisions of the Constitution of Alabama.—Art. IV. § 106.

The act is clearly a local act, within the definition of Art. IV, § 110, and the notice given, does not state “the substance of the proposed law.” A very important part of the substance of the law, is the abolition of the office of justice of the peace, and the substitution of the proposed court therefor, which is not intimated in the notice, and the reference to sections 130 and 158, Art. 7 of the Constitution is wholly misleading.

The judgment of the court is reversed and a judgment will be here rendered dismissing the petition, and taxing the costs against the petitioner, W. F. Porter.

Reversed and rendered.

MCCLELLAN, C. J., TYSON and ANDERSON, J. J., concurring.

[Central of Georgia Ry. v. Larkins.]

Central of Georgia Ry. v. Larkins.

Action against Railroad Company to recover Damages for Killing Stock.

1. *Pleading and practice; when error in sustaining demurrer to plea without injury.*—Where the facts alleged in a special plea can be introduced in evidence under the plea of the general issue, and it affirmatively appears that the defendant under plea of the general issue had the benefit of the same defense which it sought to interpose by the special plea, the sustaining of a demurrer to such special plea, if erroneous, is error without injury.
2. *Action against railroad company for killing stock; general affirmative charge.*—In an action against a railroad company to recover damages for the killing of two mules, where there is evidence from which the jury can infer that the employees of the defendant might have discovered the mules in time to have prevented the killing of them, by employing the proper means therefor, and that said employees were negligent in not averting the accident, the general affirmative charge requested by the defendant is properly refused.
3. *Same; charge of court to jury.*—In an action against a railroad company to recover damages for killing two mules, it was shown that the mules were killed by a freight train of the defendant on its road in the daytime, and where the mules were killed, the track was straight for several miles in the direction from which the train was approaching, but there was an up-grade to a point 200 yards from where the mules were first struck by the train; that at the point where the mules were struck, the track rested on an embankment 5 or 6 feet high. The evidence for the plaintiff tended to show that the sides of the embankment at such point were so steep that it would be very difficult for a mule to go up the embankment. There was testimony tending to show that the mules could not have been seen by the engineer until the engine reached the crest of the grade. The engineer in control of the engine testified that when he first saw the mules, they were standing immediately by the side of the track on the embankment, and that when the engine got within 100 or 125

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yards of the mules, they suddenly ran up the embankment on to the track; that he immediately applied the air brakes and did all that a prudent and careful engineer could do to stop the train, that he was on the lookout in the direction in which the engine was going, and that it was impossible by all means known to skillful engineers to have stopped said train after he first saw the mules before they were struck. A witness for the plaintiff testified that when the train was a quarter of a mile away from the mules, they were on the track, and that the engineer gave but one blast of the whistle, and that the train never slacked its speed until after the mules were killed. *Held*: A charge is erroneous and properly refused which instructs the jury that, "If the jury believe from the evidence that the engineer of the defendant's train was on the lookout in the direction in which the train was going, and that he could only see the mules a distance of 200 yards, then they must find for the defendant."

4. *Same; same*.—In such a case, a charge is erroneous and properly refused, which instructs the jury that, "If the jury believe from the evidence that when the mules were discovered by the engineer, and that the engineer was on the lookout in the direction in which the train was going, it was impossible to have stopped the train, by all the means known to skillful engineers, then they must find for the defendant"; such charge ignoring the evidence which tended to show that the engineer did not make use of the cattle alarm, and there was no slack in the speed of the train.
5. *Same; same*.—In such a case, a charge is erroneous and properly refused which instructs the jury that, "If the jury believe from the evidence that the mules were down at the foot of an embankment, and remained there until the train was within 100 yards of them, and that they then ran up the bank, when the train was so close to them that it was impossible to stop the train by all means known to skillful engineers, they must find for the defendant"; such charge failing to hypothesize that the engineer was keeping a proper lookout, and might not have discovered the mules earlier.
6. *Same; same*.—In such a case, a charge is properly refused which instructs the jury that, "The court charges the jury that they cannot captiously reject the testimony of any witness, and if they further believe from the evidence that the engineer was the only witness who saw the mules when they came on the track, and if they believe his testimony, then they must find

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for the defendant;" such charge giving undue prominence to the testimony of the engineer.

7. *Same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury that, "The court charges the jury that the defendant had the right to run its trains at any rate of speed it saw fit at the time and place when and where the injury happened."

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

The facts relating to the rulings of the trial court upon the pleadings and showing the tendency of the evidence introduced, are sufficiently shown in the opinion. From the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of said charges as asked: (1.) "The court charges the jury that if they believe the evidence, they must find for the defendant." (5.) "The court charges the jury that there is no evidence that the engineer was guilty of any negligence in failing to stop the train." (7.) "If the jury believe from the evidence that the engineer of the defendant's train was on the lookout in the direction in which the train was going, and that he could only see the mules a distance of 200 yards, then they must find for the defendant." (8.) "If the jury believe from the evidence that when the mules were discovered by the engineer, and that the engineer was on the lookout in the direction in which the train was going, it was impossible to have stopped the train, by all the means known to skillful engineers, then they must find for the defendant." (10.) "The court charges the jury that they cannot captiously reject the testimony of any witness, and if they further believe from the evidence that the engineer was the only witness who saw the mules when they came on the track, and if they believe his testimony, then they must find for the defendant." (11.) "If the jury believe from the evidence that the mules were down at the foot of an embankment, and remained there until the train was within 100 yards of them, and that they then ran up the bank, when the train

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was so close to them that it was impossible to stop the train by all means known to skillful engineers, they must find for the defendant." (14.) "The court charges the jury that the defendant had the right to run its trains at any rate of speed it saw fit at the time and place when and where the injury happened."

There were verdict and judgment for \$275 in favor of the plaintiff. Thereafter the defendant made a motion for a new trial, upon the ground that the verdict of the jury was contrary to the evidence, and the law, and that the court erred in its several rulings in the trial of the case. This motion was overruled, and the defendant duly excepted. The defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

CHAS. P. JONES, for appellant.

HILL, HILL & WHITING, *contra*.—If there was error in sustaining the demurrer to the defendant's special plea No. 2, it was error without injury, the defendant having had the full benefit of the defence presented thereby under its plea of the general issue.—*L. & N. R. R. Co. v. Hall*, 131 Ala. 161. The court did not err in its refusal to give the general affirmative charge requested by the defendant. Under the evidence in the case as to whether there was negligence on the part of defendant's employees is a question for the jury.—*Chatta: Sou. R. R. v. Wilson*, 124 Ala. 444; *Central of Ga. v. Dumas*, 131 Ala. 173; *A. G. S. R. R. Co. v. Boyd*, 124 Ala. 528.

DENSON, J.—This suit was brought by Caroline Larkins against the railroad company for the recovery of damages for the alleged negligent killing of two mules, the property of plaintiff, by defendant on its track, at a point between the city of Montgomery and Barachias, in the county of Montgomery.

The defendant filed two pleas in answer to the complaint, the first of which is the general issue, and the other plea, number 2, is in the following language, to wit: "For further answer to the complaint defendant says:

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that the mules, which are the subject of this suit, came suddenly on the track when the defendant's engine was so close to the animals that it was impossible to stop said train in time to avoid the accident." The judgment entry recites that plea number 2 was demurred to, and further shows that the demurrer was sustained, but we fail to find the demurrer set out anywhere in the record. Issue was joined between the parties presumably on the first plea, the plea of the general issue. It is quite apparent that all matters which might have been given in evidence under the second plea would have been competent as evidence under the general issue, and we may add, that the record shows affirmatively that the appellant had under the general issue, the benefit of the same defense which it sought by its second plea to set up. It, therefore, follows, in accordance with previous decisions of this court, that the action of the court in sustaining the demurrer to defendant's plea two, if error at all, was error without injury to the defendant.—*L. & N. R. R. Co. v. Hall*, 131 Ala. 161; *United States Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habi*, 138 Ala. 348.

One of the rulings of the court below which constitutes an assignment of error, was the refusal of the court to give the general affirmative charge with hypothesis, requested in writing by the defendant.

The evidence without conflict showed that two mules, the property of the plaintiff, were killed by a freight train of the defendant on its road at a point between Montgomery and Barachias in Montgomery county, about the 18th day of January, 1903, in the day time, and that the mules were of the value of two hundred and seventy-five dollars. The evidence further showed that from the point where the mules were struck by the engine, in the direction from which the train was approaching, the road was straight for several miles, but that the road was up grade to a point two hundred yards from the point on the road where the mules were first struck, and that the summit or crest of the grade was 200 yards from the place where the mules were struck, in the direction from which the train was approaching. The evidence further showed, that the road at the point where the

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mules were struck, rested on an embankment which was five or six feet high. There was evidence for the plaintiff tending to show that the sides of the embankment where the mules were struck were very steep, so steep that it would be very difficult for a mule to go up the embankment. There was testimony tending to show that the mules could not have been seen by the engineer until the engine reached the crest of the grade. The testimony also showed that the mules were dragged forty or fifty feet after they were struck before they were thrown off the track.

Binion, the engineer who was in control of the engine, testified when he first saw the mules they were standing immediately by the side of the "*track embankment*" and were not feeding; that the embankment was five or six feet high, and when his engine got within one hundred or one hundred and twenty-five yards of the mules, they suddenly ran up the embankment and on the track; that his train was a freight train composed of an engine tender and twelve empty freight cars and was about five hundred and twenty feet long; that he immediately applied the air brakes and that the effect of this was to apply the brakes to the driving wheels of the engine as well as to the wheels of the cars in the train; that he did not reverse his engine because whenever an engine is equipped with what is called the driver brake a train can be stopped more quickly by applying those brakes by means of the air than it could be by reversing the engine and applying the brakes as well; that after he applied the air brakes there was nothing more that a prudent and skillful engineer could do to stop the train. That the brakes on said train were in good order and when applied they held and retarded the speed of the train. He further testified that it was impossible by all the means known to skillful engineers to have stopped said train after he first saw said mules and before they were struck, and that he was on the lookout in the direction in which the engine was going and that he could not have seen the mules any sooner than he did because of the grade of the road and the cut through which the road ran; that even

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if they had been on the track they could not have been seen more than two hundred yards from the summit of the grade. He further swore that the mules were killed fifteen or twenty yards from the trestle in the bottom. Vaughn, a witness for plaintiff in rebuttal swore that the trestle referred to by the witness Binion was one-fourth of a mile from the crest of the grade.

Thomas, a witness for the plaintiff, swore that he was walking along by the side of the railroad when the train passed him and that he was about a fourth of a mile from the point where the mules were killed at the time the train passed him; that he saw the mules before the train passed him and that they were then on the track, and that the first thing he saw after the train passed him, was one of the mules on the cow-catcher, and that just as the train struck the first mule it gave but one blast of the whistle, and this was all the blowing it did; that the train never slacked its speed until after it had killed the mules.

It is apparent that there was sufficient conflict in the evidence to justify the court in refusing the affirmative charge. From Thomas and Vaughn's evidence the jury would have been warranted in drawing inferences not in harmony with the engineer's evidence, and in believing that he might have discovered the mules sooner than he testified that he did, and in time to prevent the killing of the mules, by employing proper available means to do so.—*L. & N. R. R. Co. v. Gentry*, 103 Ala. 635; *Chattanooga & Southern R. R. Co. v. Daniel*, 122 Ala. 362; *Central of Ga. Ry. Co. v. Stark*, 126 Ala. 365; *Southern Ry. Co. v. Sport*, (Ala.) 37 South 344.

For the same reasons which have been given in justification of the court's refusal to give the affirmative charge, there was no error in the refusal of charge numbered 5.

Refused charge number 7, asked by defendant, is obviously not a correct statement of the law, and in its refusal there is no error. Charges 8 and 11, ignore the evidence which tended to show that the engineer did not make use of the cattle alarm and that there was no slack in the speed of the train. Charge 11 also, fails to hypo-

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thesize that the engineer was keeping a proper lookout and might not have discovered the mules earlier. There was no error in refusing charges 8 and 11.—*Chattanooga Southern Railway v. Daniels, supra.*

Charge 10 gives undue prominence to the testimony of the engineer, Binion, and for this reason, if for none other, the refusal of the charge was not error. The court committed no error in refusing charge 14.—*L. & N. R. Co. v. Cochran*, 105 Ala. 354; *Central of Georgia Ry. Co. v. Stark, supra*; *Kelton's Case*, 112 Ala. 533; *Annis-ton Electric Co. v. Hewitt*, 36 South 39; s. c. 139 Ala. 442.

The court rightly refused to grant the motion for a new trial. There being no error in the record, the judgment of the city court is affirmed.

Affirmed.

MCCLELLAN, C. J., HARALSON and DOWDELL, J.J., concurring.

Bradley et al. v. Bell.

Bill in Equity to remove Cloud from Title.

1. *Bill to remove cloud from title; when cannot be maintained by purchaser.*—One who is holder of a bond executed by the owner of lands conditioned to make him a title to the lands described in said bond, upon the payment by him of the purchase money, cannot maintain a bill to remove a cloud from the title to said lands until he has paid the purchase money as provided for in said bond.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. RICHARD B. KELLY.

The bill in this case was filed by the appellee, V. H. Bell, against the appellants, for the purpose of having removed a cloud from the title to certain lands described in the bill, which, it was averred in the bill, complainant was entitled to.

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The averments of the bill are sufficiently set forth in the opinion. The respondents demurred to the bill upon many grounds. The first two grounds of demurrer were as follows: "1. Complainant shows no interest in the land involved, such as entitles him to maintain this suit. 2. The bill of complaint shows that at the time of the filing of the bill, complainant was not in possession of the land involved in the suit, nor had he acquired an equitable title thereto, but that he merely had a contract right in reference thereto, which might never, and for aught that appears, has never, ripened into an equitable title to the land." On the submission of the cause upon the demurrers, the chancellor rendered a decree overruling the demurrers. From this decree the respondents appeal, and assign the rendition thereof as error.

WATTS, TROY & CAFFEY and REESE & MCGAUGH, for appellant.—Cited *Echols v. Hubbard*, 90 Ala. 309; 17 Ency. Pl. & Pr., 303, n. 2; 300 n. 2; *Ashurst v. McKenzie*, 92 Ala. 484; 3 Pomeroy, § 1396; *Dick v. Foraker*, 155 U. S. 414.

POWELL & HAMILTON, *contra*.—Cited *Faulk et al. v. Calloway*, 123 Ala. 325; *Scott v. Land Mortgage Investment & Agency Co.*, 127 Ala. 161; *Motes v. Robertson*, 133 Ala. 630; *Shearer v. Sydney Union Bank of Birmingham*, 155 Ala. 352.

McCLELLAN, C. J.—This bill is filed by Bell against Bradley and others. Its purpose and object is to remove a cloud from the title of land. Bell is not in possession. The true title confessedly is not in him, but in the executors or devisees of Mrs. M. M. Tyson, deceased. And even in them, it would seem from the allegations of the bill, the title is equitable, resting upon an equitable estoppel *in pais* against the Bradleys, respondents. Bell claims that he has the equitable title. But the averments of the bill show that he has not. His sole interest in the land rests upon the facts that he is the holder of a bond executed by Mrs. Tyson conditioned to make him a title to this, along with other land upon payment by him of

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purchase money. His only connection with or relation to the title is through and by virtue of this executory contract of sale. This is not equitable title. Such title exists when the party has a right to go into a court of equity upon a present status and demand the conveyance to him as the investiture in him of the legal title. This right he has not because he has not paid the purchase money. He may never pay it. So he may never have any title to be conserved by a removal of the alleged cloud. The successors in title, legal or equitable, of his vendor could maintain a bill to remove the cloud, assuming the Bradley claim to be a cloud. Upon the same assumption Bell could probably maintain such bill when he has paid the purchase money. But not now. But if the cloud is never removed, if the Bradleys effectuate their claim to this part of the tract embraced in the contract of sale, Bell would not suffer. He would be entitled to an abatement of the purchase money to the extent of the relative value of their land.

It follows from these views that in our opinion the first and second assignments of demurrer were well made, and that the demurrer should therefore have been sustained. The other questions raised by the demurrer are not and, it would seem, cannot become important in the case, and we therefore do not consider them.

The decree must be reversed, and a decree will be here entered sustaining the demurrer. It is difficult if not impossible to conceive that this bill can be amended so as to give complainant a standing in court; but as the case comes here on a decree on demurrer and not on motion to dismiss for want of equity, complainant will be given leave to amend within thirty days.

Reversed and rendered.

HARALSON, DOWDELL and DENSON, J.J., concurring.

[Childers v. Shepherd.]

Childers v. Shepherd.

Petition for Mandamus.

1. *Constitutional law; act authorizing establishment of dispensaries in incorporated towns and cities in Walker County valid.* The act approved March 3, 1903, authorizing the establishment of dispensaries in incorporated towns and cities in Walker County, upon its ratification by a popular vote (Acts of 1903, p. 137), is constitutional and valid.
2. *Constitutional law; sufficiency of affidavit accompanying notice of local law.*—An affidavit accompanying the notice given of the intention to introduce a local law as required by Section 106 of the Constitution, which is headed: "State of Alabama, Walker County," and then recites that before the officer certifying the affidavit there appeared a certain named person known "to be the editor and manager of the Mountain Eagle, a newspaper published at Jasper, in said County, who, being duly sworn, deposes and says that the attached notice was published once a week for four successive weeks in said newspaper before the making of this affidavit," is a sufficient affidavit and proof of notice.
3. *Same; what is sufficient spreading of notice and proof upon the Journal.*—The pasting on the Journal of the House of Representatives and Senate of a newspaper clipping which contained the publication in full of a local bill, together with a typewritten copy of the affidavit of the publisher of the newspaper in which it was printed, constitutes a spreading of notice and proof of the intention to introduce such local bill in the Legislature, upon the Journal of each House, in compliance with Section 106 of the Constitution.
4. *Same; same.*—Where it appears from the Journal of each House of the Legislature that there was a joint resolution on the last day of the session of the Legislature which authorized the spreading upon the Journal of each House of the proof by affidavit of the publication of all local bills passed by the Legislature at that session, and that at the end of all of the proceedings of the last day of the session, as set forth in the Journal, there was a spreading thereon of the notices and proof of notices of local bills, including the one in question,

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followed by a recital of the final adjournment of the Legislature, certified by the presiding officer and attested by the secretary and clerk, there is shown a sufficient compliance with the provisions of Section 106 of the Constitution relating to such local bills.

5. *Constitutional law; act establishing dispensaries not invalid as granting exclusive privileges of selling intoxicating liquors by towns and cities in Walker County.*—The act of the Legislature authorizing all incorporated towns and cities in Walker County to establish and operate dispensaries, is not violative of Section 22 of the Constitution in that it grants to towns and cities of Walker County the exclusive privilege of selling intoxicating liquors.
6. *Same; validity of act authorizing establishment of dispensaries in towns and cities in Walker County.*—The act of the Legislature "Authorizing incorporated towns and cities in Walker County to establish and operate dispensaries," etc., is not unconstitutional and void, because it authorized the people of Walker County by their votes to ratify the provisions of said act repealing all existing laws on the subject of selling intoxicating liquors in said county which might be in conflict with said act.
7. *Constitutional law; Legislature may pass act to take effect upon some future event.*—The Legislature may pass a valid statute to take effect upon the happening of a future event, and such statute will not on that account be held unconstitutional.
8. *Same; same; local law.*—A valid local law may be passed by the Legislature to take effect by its ratification by the people of the county or district to be affected thereby.

APPEAL from the Circuit Court of Walker.

Tried before the Hon. JAMES J. RAY.

S. J. Childers, a citizen of Walker county, filed his petition, addressed to the Hon. J. J. Ray, Judge of the 14th Judicial Circuit of Alabama, asking for the issuance of a writ of mandamus directed to the appellee, James W. Shepherd, as Judge of Probate of Walker County, commanding him to issue the petitioner a license as a retail liquor dealer in the town of Jasper in said county. It was averred in the petition, that the said petitioner had applied to the said James W. Shepherd, as Probate Judge of said county, for a license to retail spirituous, vinous and malt liquors in the corporate limits of the town of

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Jasper; that he had complied with the law in that he had presented at the same time with his application, a recommendation in writing, signed by twenty respectable freeholders, residing within the corporate limits of said town, who certified that the petitioner was a man of good moral character, and in all respects a proper person to be licensed as a retail liquor dealer, and that he had tendered to the Judge of Probate the amount of money required to be paid for obtaining a license; but that said James W. Shepherd, as such Judge of Probate, had refused and declined to issue to him such license. The respondent waived the issuance of the rule nisi or other notice, and filed his answer admitting the allegations of the petition as to application for license as alleged, and its refusal. Respondent further alleged that he refused to issue the license for the reason that the sale of spirituous, vinous and malt liquors as proposed by the petitioner, was and is prohibited by law, that on the 3rd of March, 1903, an act of the Legislature of Alabama, was approved, entitled "An act to authorize all incorporated towns and cities in Walker County to establish and operate a dispensary or dispensaries in such incorporated towns or cities for the purpose of buying and selling spirituous, vinous and malt liquors, and to provide for the distribution of certain profits arising therefrom, and to further regulate or prohibit the sale of such liquors in said county, upon the casting of a majority vote in favor of said dispensaries, at an election to be held in said County on Tuesday, the 4th day of August, 1903," and which act was made a part of said answer.

The petitioner replied to the answer of the respondent, and answered that the said act set out in said answer was never lawfully adopted by the Legislature of Alabama, and that the said act is unconstitutional, null, and void; that no lawful or authorized election was held in said County of Walker on Tuesday, the 4th day of August, 1903. but that any election held in said County under the said act was unauthorized, unlawful, unconstitutional, null and void.

On the hearing the petitioner offered the deposition of J. Thomas Heflin, Secretary of State, and Elmore

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Garrett, Secretary of the Senate. There was judgment rendered denying the relief prayed for in the petition. From this judgment the present appeal is prosecuted, and the rendition thereof is assigned as error.

EMMETT O'NEAL and THOMAS R. ROULHAC, for appellant.—The pasting on the Journal of the Senate after its final adjournment, of the newspaper clipping containing the substance of the proposed law and the typewritten copy of the affidavit of the newspaper proprietor, was not a "spreading on" the journals in compliance with the Constitution. The secretary of the Senate was not authorized to make these pasted entries on the journals after the final adjournment of the Legislature.—*Montgomery Beer Bottling Works v. Gaston*, 28 S. R. 504; *State v. Wilson*, 123 Ala. 259; *Robertson v. State*, 30 S. R. 494; *Ex parte Howard Harrison*, 119 Ala. 484.

But even if it should be held that the amendments and alterations made by the secretary of the Senate, of the Senate Journal of the 36th day, after the adjournment of the Legislature *sine die* on the third of October, 1903, and his act of pasting the newspaper copy of the bill, with the typewritten copy of the affidavit of the newspaper editor, was a compliance with the requirements of section 106 of the Constitution, the pertinent inquiry is, by what authority were these corrections and entries on the Journal made. If they were made by the secretary without the authority of the Senate, or after its final adjournment, they were simply interpolations, which were unauthorized and void.—*People v. Burch*, 84 Mich. 408; *State v. Wilson*, 123 Ala. 269; *Harrison v. Gordy*, 57 Ala. 49; *Jennings v. Russell*, 92 Ala. 606

The act is unconstitutional, because by section XI it authorizes the people of Walker County by their vote to repeal all existing laws on the subject of intoxicating liquors in conflict with the act. The Legislature cannot delegate to the people the power of repealing existing laws.—*Mitchell v. State*, 134 Ala. 411; 6 Ency. Law., 2d Ed. p. 1023, and notes; Black on Constitutional Law, p. 324; Century Digest, vol. 10, p. 1394.

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Hon. J. J. Ray was acting as Circuit Judge for Walker County. He was exercising all the powers and authority of such a Judge. His Court was held at the Court House, and there was no question raised at the time of the trial of his power to decide this case. If he was not a *de jure*, he was a *de facto* judge.—*Masterson v. Matthews*, 60 Ala. 264; *Thompson v. State*, 21 Ala. 48; *Diggs v. State*, 49 Ala. 311; *Roundtree's Case*, 51 Ala. 42; *Floyd v. State*, 79 Ala. 39; 126 Ala. 74.

W. C. DAVIS and W. L. MARTIN, *contra*.—Except as restrained by the State or Federal constitution, the power of the Legislature is unlimited.—*Dorman v. State*, 34 Ala. 216; *Davis v. State*, 68 Ala. 58; *Moog v. Randolph*, 77 Ala. 597; *Capital City Water Company v. Board of Revenue*, 117 Ala. 303; *Shepherd v. Dowling*, 127 Ala. 1.

The Legislature having the right to prohibit entirely the sale of intoxicating liquors, may prohibit its sale by individuals and private corporations and commit the traffic exclusively as a mode of regulation to counties and towns, without violating any right of the citizen, and without infringing the rule against class and unequal legislation.—*Shepherd v. Dowling*, 127 Ala. 1; *Hubbard v. Lancaster*, 127 Ala. 157; *Ard v. Ozark*, 127 Ala. 671.

The Constitution of 1901, does not in any manner curtail or restrict the power formerly exercised by the Legislature in respect to the liquor traffic, but on the contrary expressly preserves such power to the Legislature, subject only to the provisions of section 106 as to notice. Proviso to Sec. 104; Debates of July 11, 1901.

The observance of due respect to a co-ordinate department of the Government requires that the Legislature and the two Houses thereof be left free to adopt and pursue the rules for their own proceedings and the methods of placing them upon record, subject to judicial review only in the particular case specified in the Constitution.—*Dorman v. State*, 34 Ala. 216, 234; *Trammell v. Pennington*, 45 Ala. 673, 678; *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484.

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The manner of keeping its journal and making entries therein are matters falling within the domain of the power of each House "to determine the rules of its own proceedings," and of the two Houses in the exercise of "all the powers necessary for the Legislature of a free state," as guaranteed by section 53 of the Constitution.

Each House has the inherent power to amend its records at the same or a subsequent session so as to make them speak the truth and such amendment relates back and has effect from the time the business was actually transacted.—*Vandyke v. State*, 22 Ala. 57; *Hudley v. Yonge*, 69 Ala. 89; *Keith v. State*, 91 Ala. 2; *Turley v. County of Logan*, 17 Ill. 150.

The journals of the two Houses of the Legislature import absolute verity and cannot be varied or contradicted by parol evidence.—*State v. Buckley*, 54 Ala. 599; *McKennie v. Gorman*, 68 Ala. 442; *Jennings v. Russell*, 92 Ala. 603; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425; *Robertson v. State*, 130 Ala. 164.

A new constitutional provision will be read and construed in the light of existing conditions, and in view of the evil which it was designed to remedy.—*Walker v. City Council*, (Ala.), 36 So. 23; *Bender v. Meyer*, 55 Ala. 576; *Taylor v. Woods*, 52 Ala. 474, 477.

HARALSON, J.—It is admitted by counsel for petitioner that "the sole question raised by the record is whether the act which authorized dispensaries in Walker county upon its ratification by a popular vote and the election held under its provisions, was constitutional."

So far as what occurred in the House of Representatives where the act originated is concerned, it cannot be successfully contended that there was any thing done or omitted, which subjected it to constitutional infirmity. The bill in question was introduced, accompanied by notice and proof of notice, such as is required by § 106 of the Constitution. The notice given consisted of the publication in full of the bill itself, together with its title, accompanied by the following affidavit: "The State of Alabama, Walker county. Before me, Sheriff Lacy,

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Register in Chancery in and for said county, this day personally came J. C. Norwood, known to me to be the editor and manager of the Mountain Eagle, a newspaper published in Jasper, in said county, who being by me duly sworn, deposes and says, that the attached notice to authorize all incorporated towns and cities in Walker county to establish and operate a dispensary or dispensaries in such incorporated towns or cities, was published once a week for four consecutive weeks in said newspaper before the making of this affidavit."

The criticism of counsel that this affidavit does not state the name of the newspaper, and the name of the county in which said paper was published, is without merit. The affidavit is headed, "State of Alabama, Walker County," and refers to the name of the paper in which it was published as the Mountain Eagle, published at Jasper in said county, of Walker, and it further states, that the notice was published for four consecutive weeks in said newspaper, referred to in the affidavit,—The Mountain Eagle, published at Jasper in said county. It thus appears, that the notice and proof of notice were sufficient; and, the bill, with such notice and proof, was duly passed by the House.

After the passage of the bill in the House, that body caused it to be sent to the Senate, with the message that "The House has originated and passed the following bills and ordered the same sent to the Senate without engrossment." Among the number was the bill in question, its transmission being accompanied with the statement, "Said bill is accompanied by legal notice and proof and which notice and proof, appears in the House Journal as required by law."

The original journal plainly shows that after proof by affidavit of the notice of the proposed law was exhibited to the House, where the measure originated, it was also exhibited to the Senate, along with the bill when it was transmitted without engrossment to the latter body. The bill as originally introduced into the House, passed the Senate on the 26th of February, 1903. The journal also shows that the notice and proof thereof were spread at length on the journal of the Senate.

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It is said that the entries of this notice and proof consisted of a newspaper clipping of the bill in question, pasted on the journal together with a typewritten copy of the said affidavit of the publisher of the Mountain Eagle, also pasted thereon. That this was such a spreading of the notice and proof upon the journal, as complies with the law, was held in the case of *Dudley v. Fitzpatrick*, at the present term, in MS.

It is again objected that this entry was made after the adjournment of the Legislature, by virtue of a general resolution of the two Houses authorizing and directing it to be done.

The original journal of the Senate of the 60th and last day of the session, at the end of all its proceedings, including a spreading thereon of the notices and proofs of notices of local bills, including the one in question, shows a final adjournment of the Legislature, certified by its President, and attested by its Secretary, making it thus affirmatively appear, that the journal was completed before final adjournment. It is said, however, that the proof shows, that this, and some other notices and proofs of notice of local bills were, in fact, spread upon the journal after the Legislature adjourned. If it were competent to consider such proof, which we do not decide, yet, there does appear on the journal of the Senate, a joint resolution of the two Houses, adopted October, 3rd, 1903, on the last day of the session, which authorized the spreading upon the journal of each House, the proof by affidavit of the publication of all local bills passed by the Legislature at that session, which was sufficient for the purpose.

The proposition that the act is in violation of section 22 of the Constitution in that it grants to towns and cities of Walker county, the exclusive privilege of selling intoxicating liquors, is wholly wanting in merit.—*Shepherd v. Dowling*, 127 Ala. 1; *Hubbard v. Lancaster*, Ib. 157; *Ard v. Ozark*, Ib. 671.

It is again insisted that this act is unconstitutional, because by section 11 it authorizes the people of Walker county by their votes to repeal all existing laws on the

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subject of intoxicating liquors, in conflict with the act.

Section 11 referred to, provides that this act shall not repeal the dispensary act passed at the same session of the Legislature for precinct No. 5 of Walker county, until January, 1904, and not then, unless this act in the meantime has been ratified by a majority of the qualified voters of said county, voting at the election, authorized by sections 19 and 20 of the act. These sections provide for an election by the qualified voters, to determine if said dispensary law for the certain county should be ratified. If ratified, the Legislature simply provides for the repeal of the other dispensary law for precinct number 5 of the county, the repeal to go into effect on the 1st of January, 1904. There was no use in having two dispensary laws in the county. If the last was ratified, it gave precinct number 5, all that was conferred on it by the special law for that particular precinct. The Legislature may pass a valid statute, to take effect on the happening of a future event, and the statute will not, on that account, be held to be unconstitutional.—*Davis v. State*, in MS; *Hand v. Stapleton*, 135 Ala. 162.

A local law may be passed to take effect, on the ratification of the same by the people of a county or district thereof.—*Stanfield v. Board of Revenue*, 89 Ala. 407; *Edmondson v. Ledbetter*, 114 Ala. 479.

It appears that the judgment in this case was rendered by a court presided over by a *de facto* judge, at a time when the court could be legally held. There was no error in denying the writ of mandamus.

Affirmed.

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

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Marbury Lumber Company *et al.* v. Harriet Posey.

*Bill in Equity to have declared Void a Conveyance of
Land and for Injunction.*

1. *Bill to redeem under a mortgage; when husband of complainant necessary party.*—Where a bill is filed by a married woman, who claims title by a deed from her husband to have a deed to certain lands executed by her and her husband to a third party declared a mortgage and to have the same annulled on the ground of payment, or to be allowed to redeem, if the mortgage indebtedness is not paid, the husband of the complainant is a necessary and indispensable party to the suit, and the failure to make him a party is fatal to obtaining the relief prayed for; and of this defect the court can take notice *ex mero motu*.

APPEAL from the Chancery Court of Autauga.

Tried before the Hon. RICHARD B. KELLY.

The bill in this case was filed by the appellee, Harriet Posey, against the appellants.

The bill was several times amended, and as finally amended averred that in the year 1870 Nathan Posey, the husband of complainant, entered the lands in controversy, as a homestead, under the United States Homestead Act; that after his entry, Nathan Posey, through threats of arrest and prosecution, was induced to execute a quitclaim deed to said lands, conveying his right, title and interest to one Kineon Wells; that this deed was executed on Oct. 8th, 1883; that there was never any consideration of any kind for said deed; that if there was any debt due by the said Nathan Posey to the said Wells, that the deed was intended as a mortgage to secure the repayment of said debt. and that since its execution Nathan Posey had paid said Wells every cent that he owed him, and that the complainant offered to pay what might

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be found due; that on March 31st, 1885, the said Nathan Posey perfected his right to the lands in controversy, and received a patent thereto, and remained in possession of said lands undisturbed until Oct. 5th, 1892, when said Wells recovered said lands in an action of ejectment which was not defended by the complainant or her husband, Nathan Posey; that on December 14th, 1889, her husband, Nathan Posey, executed a deed conveying said lands to her, which deed recited as a consideration that the conveyance was made in payment of money belonging to the complainant, which said Nathan Posey had used for his individual benefit; that on March 3d, 1894, said Kineon Wells executed a deed conveying said lands to the Marbury Lumber Company, but that at such time the complainant was in possession of said lands, claiming them as her own, and that therefore the deed from Wells to the Marbury Lumber Co. was void; that after recovery of the judgment in the ejectment suit, the Marbury Lumber Co. had issued a writ of possession in order to take the property from the possession of complainant and deliver the possession thereof to the Marbury Lumber Co.

As originally filed, Nathan Posey, the husband of the complainant, was made a party defendant, but subsequently the bill was amended by striking out Nathan Posey as a party to the suit.

The prayer of the bill was that the Marbury Lumber Co., its agents, attorneys and employees, be restrained from executing the writ of possession, or from interfering in any manner with the complainant in the possession of said lands; that said deed or mortgage executed by Nathan Posey and the complainant to said Kineon Wells be declared null and void, and that the conveyance executed from Wells to the Marbury Lumber Co. be delivered up and cancelled; and in that alternative, that in the event such conveyance from complainant and her husband to Wells be declared to be a mortgage, that it be ascertained how much, if anything, was due thereon, and that complainant be permitted to pay whatever might be due, and that the same be thereby satisfied and cancelled.

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To the bill as finally amended, the respondent demurred upon several grounds, among which was the ground that Nathan Posey was a necessary party to the bill. On the final submission of the cause upon the pleadings and the proof, the chancellor overruled the demurrers and decreed that the complainant was entitled to the relief prayed for, and so ordered.

From this decree the defendants appeal and assign the rendition thereof as error.

RAY RUSHTON, for appellants.—The demurrer to the amended bill should have been sustained. Nathan Posey, the husband of the complainant, was a necessary and indispensable party.—*P & M. Bank v. Lauchheimer*, 102 Ala. 454; *Elliott v. Sibley*, 101 Ala. 344; 18 Enc. Pl. & Pr. 799; *Gifford v. Workman*, 15 Ia. 34; *Dooley v. Villalonga*, 61 Ala. 129, 3d h. n; *Boyle v. Williams*, 72 Ala. 353; *Gayle v. Toulman*, 5 Ala. 283.

H. E. GIPSON, *contra*.—Nathan Posey was not an indispensable party to the suit. He is not shown to have been pecuniarily interested in the result of the suit.—29 Amr. & Eng. Ency. of Law 7564; *Howle v. Edwards*, 97 Ala. 649.

TYSON, J.—Accepting complainant's theory of the bill, as amended, as being one for the redemption of land conveyed by the deed of her husband to Wells, which deed, it is alleged, was intended as a mortgage to secure the payment of the debt of the husband, is not the husband a necessary party to the proceedings? If he is, this omission or defect is fatal to the decree, and this court must *ex mero motu* take notice of it.—*Dooley v. Villalonga*, 61 Ala. 129.

The title to the land, when the conveyance was made to Wells, was in the husband. He is the mortgagor and liable for the debt, and it is with him that Wells' representatives or assigns are entitled to have an accounting. Indeed, there is no other person with whom the accounting of the amount of the mortgage debt may be had. It

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is indispensable to a proper adjustment and adjudication of the rights of all the parties that the rights of the mortgagor should be concluded by the decree, which, of course, cannot be done unless he is a party. It seems to us so clear that complainant's husband is an indispensable party that a further consideration of the question is unnecessary. We need only cite in support of this conclusion the following authorities; 17 Ency. Pl. & Pr. p. 959; *Clark v. Long*, 4 Rand. (Va.) 451; *Sanborn v. Sanborn*, 104 Mich. 180.

Reversed and remanded.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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Action upon a Promissory Note.

1. *Bill of exceptions; when sufficiently shown to have been signed within the time allowed by order of the court.*—Where a bill of exceptions purports to be signed in September, 1900, but the day of signature is not specified, and it was shown that there was an order of the court made allowing 30 days for signing a bill of exceptions, without specifying when that period should begin or end, and it does not appear when the court adjourned, but under the statute the court could have continued to a time within 30 days next before September, and there is at the conclusion of the bill of exceptions an affirmation that the same was signed within the time allowed by the court, such recital is a *prima facie* showing that the bill of exceptions was signed on the day within 30 days as fixed by order of the court, and in the absence of evidence contradicting such recital, the bill of exceptions will not be stricken on motion, and will be considered on appeal.
2. *Action upon promissory note; material alteration avoids contract evidence.*—An alteration which makes a promissory note speak a language different in legal effect from that which it originally spoke, is material, and when made by one not a stranger to the paper, is sufficient to avoid the con-

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tract as to all parties not consenting thereto; and in an action upon such note, under issues properly presented, evidence tending to show such material alteration is admissible.

3. *Action upon a note; failure of consideration; general affirmative charge.*—In an action upon a promissory note, where the defendant pleads a failure of consideration, to which special plea the plaintiff files a special replication, and there was evidence supporting the plea setting up a failure of consideration, and there was no evidence introduced by the plaintiff to prove the material affirmance of his replication, the defendant is entitled to the general affirmative charge, and it is not error for the court to give such charge at defendant's request.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the appellant, J. S. Carroll, against the appellee, J. M. Warren. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the plaintiff requested the court to give to the jury the general affirmative charge in his behalf, and duly excepted to the court's refusal to give said charge, as asked. The plaintiff also duly excepted to the court's giving the general affirmative charge in favor of the defendant at his request.

There were verdict and judgment for the defendant. The plaintiff appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

In this court there was a motion made to strike the bill of exceptions from the record, upon the ground that it was not signed within the time required by law.

FOSTER, SAMFORD & CARROLL, for appellant.—Cited *Holmes v. The Bank of Fort Gaines*, 120 Ala. 493; *Capital City Insurance Co. v. Quinn*, 73 Ala. 561; *Perryman v. Greenville*, 55 Ala. 507.

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G. J. HUBBARD and S. M. DINKINS, *contra*.—Cited *Home Protection of North Alabama v. Caldwell Bros.*, 85 Ala. 610; *Mudge v. Treat*, 57 Ala. 5; *Renfro Bros. v. M. & M. Bank*, 83 Ala. 425; *Jones v. Collins*, 80 Ala. 108.

SHARPE, J.—The motion to strike the bill of exceptions cannot prevail. The bill of exceptions was filed in the circuit court, September 14th, 1900. It purports to have been signed in September, 1900; the day of signature not being specified. It contains an affirmation of the judge to effect that the same was signed within the time allowed by the court and an order of court had allowed for the signing thirty days, without specifying when that period should begin or end. The effect of this order was to extend the time for signing, thirty days from the final adjournment of the term.—*Morningstar v. Stratton*, 121 Ala. 437. When that adjournment occurred does not appear, but under the statute the court could have continued to a time within the thirty days next before September, hence the affirmation referred to is consistent with the record and is taken as true.—*Tarver v. State*, 137 Ala. 29.

Plaintiff sues as a transferee of a promissory note which in the complaint is averred to have been made by defendant payable to the order of W. T. Magee & Co., at the Peoples' Bank of Troy, Alabama. The pleas are the general issue, *non est factum*, and the two other pleas, each averring a failure of consideration. To the plea of *non est factum* plaintiff filed a special replication averring that the plea was based on an alleged alteration of the note, and further averring matter to show he, the plaintiff, had made no material alteration and that he held the same as a *bona fide* purchaser for value. To the two pleas setting up failure of consideration there was interposed the general issue and a special replication which went also to the plea of *non est factum*, averring "that the note sued upon was executed in Alabama, payable at the Peoples' Bank in Troy, Alabama, in money at a fixed time and was purchased by the plaintiff before maturity in the usual course of business for a valuable consideration, without notice of any defect or

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infirmity in the note or any defense thereto as set out in said pleas."

There are assignments of error based upon the admission of testimony which, with reference to a note in evidence, was given by defendant to effect that "the note had been changed since he signed and delivered it by adding the words 'The Peoples' Bank, Troy, Alabama' after the printed words 'value received at' and by affixing thereto revenue stamps and cancelling the same; that the same was done without his knowledge and consent and by some one not authorized by him to do so, and that he had never consented to or ratified the change, and that he had expressly refused at the time said note was given to give a note payable at a bank." The words so said to have been added made the note import negotiability, whereas, under our statute, without words designating a place of payment the instrument would not have been negotiable. An alteration which makes a note speak a language different in legal effect from that which it originally spoke, is material, and when made by one not a stranger to the paper is ordinarily sufficient to avoid the contract as to all parties not consenting thereto. *Montgomery v. Crosthwaite*, 90 Ala. 553; *Woodworth v. Bank*, 19 Johns. 391; 10 Am. Dec. 239.

The next assignment of error relates to the giving of the general affirmative charge in favor of defendant. Upon the hypothesis of the charge that the evidence was believed, the pleas of failure of consideration were conclusively established, the evidence on that subject being positive in support of those pleas and being also without contradiction. The special replication to those pleas which if proved, might have avoided the defense of failure of consideration, was in that part which averred the note was "executed in Alabama payable at the Peoples' Bank in Troy, Alabama" lacking of support in the evidence. That averment was material to be proved and without proof of it plaintiff was not entitled to succeed on that replication. Apart from the note itself the only evidence as to whether the note when executed designated a place of payment, was in the testi-

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mony of defendant above quoted from the bill of exceptions and that evidence, if believed, showed there was then no such designation. The note which in the original is sent here for inspection does not by its physical appearance or otherwise afford any inference adverse to this testimony. Such conditions inhering in the pleadings and evidence justify the giving of the charge requested by defendant, and the refusal of that requested by the plaintiff.

Judgment affirmed.

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Action of Trover.

1. *Agency; when notice to agent not notice to principal.*—When information is given to an agent upon a casual occasion, when no act or transaction of the agency is pending, and the occasion has no reference to the principal or to his business, such information to the agent is not notice to the plaintiff of the existence of the fact about which it is given.
2. *Action of trover; priority of mortgage.*—Where in an action of trover, the plaintiff claims under a mortgage which was duly recorded, and which was given to secure the repayment of a debt presently contracted, and the defendant claims under a mortgage which was not recorded, and of which the plaintiff had no actual notice, the plaintiff occupies the position as to the defendant of a purchaser for value of the property included in his mortgage, which constitutes a prior lien, and the mortgage given to the defendant, though executed prior to the plaintiff's mortgage, cannot affect plaintiff's right to recover, and the defendant's mortgage is not admissible in evidence.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. N. D. DENSON.

This is an action of Trover brought by the appellee (Irvin) against the appellant (Patterson) originally in Justice Court, for the conversion of one red and white

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spotted steer, appealed to the Circuit Court and from a judgment in favor of appellee in that court this appeal is prosecuted.

The evidence, as appears from the bill of exceptions, shows without conflict that on Feb. 3rd, 1900, L. C. Sinclair owned the steer in controversy and was in possession of the same, and that he then lived in Clay County and the property was located in such county; that on that date, and while he so owned and was in possession of such property, he executed the mortgage to appellee set out in the record, the same being made to secure a note for \$54.54 of even date payable to appellee Oct. 1, 1900, and also to secure "all the debts heretofore accrued and all other further additional supplies or other goods over and above the amount of said note, advanced by said W. F. Irvin."

The execution of this mortgage was duly proven and the same was duly recorded in the office of the Judge of Probate of Clay County on Feb. 6th, 1900, as shown by the evidence. L. C. Sinclair testified that the note for \$54.54 was for money paid by W. F. Irvin at his (witness) request to one Pepper, who was the owner of a note originally executed by witness to Dunham and transferred by Dunham to Pepper, "And that with the \$54.54, Irvin paid off the note to Pepper for him;" that Irvin furnished him supplies to make his crop with, and that such supplies together with \$30.00 rent for land he rented of Irvin aggregated about \$80.00; that he was Irvin's tenant during that year; that the advances were made to him as a tenant; but after the mortgage was executed and the supplies were to be secured by the mortgage; that the \$80.00 was over and above the note for \$54.54.

The evidence further showed without conflict that the defendant (appellant) had converted such steer and made beef of it; plaintiff claimed title under this mortgage. Suit was brought a short time after the conversion. Defendant (appellant) undertook to assert title under a prior unrecorded mortgage dated at Goodwater, Alabama. November 15th, 1899, purporting to have been executed by L. C. Sinclair to A. K. Patterson to secure an

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indebtedness of \$10.50 and purporting to convey "one steer yearling about 2 years old, red and white spotted." There was no evidence that such "steer yearling" was the same involved in this suit, or that L. C. Sinclair owned or was in possession of any such "Steer yearling" on the 15th day of November, 1899.

There is also some evidence set out in the bill of exceptions as to the agency of one John R. Irvin, for plaintiff. Subsequently the only testimony as to such agency is that of the plaintiff himself, who testified on cross-examination that John Irvin was his brother and attended to his mercantile business during the year 1900, and took notes and mortgages in connection with such business but did not do so exclusive of him (plaintiff), that he himself frequently took such notes and mortgages, and did most of his trading for papers; that John did some of it, but only when authorized by him; when parties were owing him that John would sometimes take notes for the amount, and sometimes would shave paper for him, but only when he authorized him to do so. It was also shown that John Irvin took the mortgage from Sinclair, under plaintiff's express authority.

The evidence also further showed without conflict that only \$2.00 had ever been paid on the note for \$54.54 secured by such mortgage. The only assignments of error are as to the court sustaining objections to certain questions, and in excluding the alleged mortgage purporting to have been executed by Sinclair to appellant.

D. H. RIDDLE, for appellant.—The court erred in excluding the evidence as to the agency of John Irvin. One way of showing agency is by showing the conduct of parties towards each other, or holding one out as an agent, and lets in all proof of acts and conduct of parties, whether it bears on the direct issue or not.—*Tenn. River v. Karinaugh*, 101 Ala. 1; *Reed v. Bank of Mobile*, 70 Ala. 199.

A purchaser to be protected must be a purchaser for value without notice.—*Steiner v. Clisby*, 95 Ala. 91; *Chadwick v. Carson*, 78 Ala. 180. A mortgage given only to secure antecedent debt does not entitle the mortgagee

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to protection even in equity.—*Jane & DuPree v. Robinson*, 77 Ala. 499; 4 Mayfield Digest, 229, § 769 and authorities there cited.

WHITSON & DRYER, *contra*.—The existence of a fact can never be proven by evidence of general reputation or notoriety; sometimes after such facts have been proven, such evidence is admissible to charge a person in the neighborhood with notice thereof.—*Woods v. Montevallo Coal Co.*, 84 Ala. 564; *Martin v. Mayer*, 112 Ala. 620. General notoriety or reputation is not admissible in evidence to prove the fact of agency.—*Central R. R. & Banking Company v. Smith*, 76 Ala. 572; *Fanner v. Hall*, 86 Ala. 305; *Blevins v. Pope*, 7 Ala. 371. Whenever a mortgagee contemporaneously with the execution of the mortgage parted with any thing of value, incurred a fixed liability, or submitted to loss or detriment, he is a bona fide purchaser and is protected under the statute.—*Sweeney v. Bixley*, 69 Ala. 540.

McCLELLAN, C. J.—No evidence was adduced or proposed tending to show that John Irvin received any notice as agent of the plaintiff or while engaged in or about any act or transaction of such agency of the mortgage executed by Sinclair to the defendant. To the contrary, while defendant offered evidence to show that he had informed John Irvin of the existence of such mortgage, it was made to affirmatively appear that this information, assuming it to have been given at all, was imparted upon a casual occasion when no act or transaction of the agency was pending and had no reference to the plaintiff nor to his business. This information to John Irvin, therefore, was not notice to the plaintiff of the existence of the mortgage to Patterson, conceding that John Irvin was the agent of W. F. Irvin, the plaintiff, in the most general and comprehensive sense, and that the fact of such general agency was well known in the vicinity. It follows that the rulings of the court upon the admissibility of proposed testimony as to the existence and scope of the agency were wholly immaterial,

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the fact of the agency and its character being itself wholly immaterial.

The mortgage in question was not recorded, and hence plaintiff had no constructive notice of its existence.

The evidence was without conflict to the effect that the plaintiff had no actual notice of this mortgage, when the mortgage from Sinclair to him was executed.

This latter mortgage was not taken to secure an antecedent debt owing by Sinclair to the plaintiff, but to secure the repayment of money presently paid by plaintiff for Sinclair; and the doctrine that one who takes a mortgage to secure an antecedent debt cannot claim protection from a prior unrecorded mortgage as a *bona fide* purchaser for value, has no application to the cause.

Plaintiff having no notice, actual or constructive, of Patterson's prior mortgage, and sustaining the attitude of a purchaser for value of the property embraced therein, that instrument had no bearing upon his right to recover in this case, and it was properly excluded from the evidence.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concur.

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Bill to remove Cloud from Title.

1. *Resulting trust in lands; law creates in favor of party paying purchase money, but taking conveyance in name of another; agreement between the grantee and the purchaser to that effect need not be in writing.*—If the purchaser of lands, paying the purchase money, takes the conveyance in the name of another, a trust in the lands results by construction to him from whom the purchase money moves, and the fact that there was a parol agreement between these two parties recognizing said resulting trust does not take the transaction out of the category of resulting trusts.
2. *Same; same; Section 1041 of Code.*—Those trusts in lands which result by implication or construction of law, such as a trust

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resulting to the purchaser of lands who takes the title in the name of another, are not required by Section 1041 of the Code to be in writing.

3. *Bill to quiet title; inconsistency in averments of same.*—A bill to quiet title, which alleges that the complainant has title and is in possession, and that the defendant has no right, title, estate or interest in the land and prays that defendant show what claim or title he has, and that the court quiet complainant's title and decree that defendant has no title, and which also alleges that the legal title is in defendant, but that the defendant holds it in trust for complainant, and containing no appropriate prayer for the enforcement of said trust, is inconsistent, and subject to demurrer.
4. *Powers of attorney; reference to same in complaint by book and page thereof, insufficient.*—Where certain powers of attorney are essential to a complaint, the complaint should contain the substance of same with sufficient definiteness to have informed the defendant what they contained, and a complaint which merely contains a citation of the date of such powers of attorney, the book wherein they are recorded and page thereof, is subject to demurrer.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

This was a bill filed in the Chancery Court of Mobile by appellee, C. C. Mechem, against the appellant J. T. Long and one McKenzie to remove a cloud upon title. McKenzie filed a disclaimer. The original bill in the case, as amended is as follows: "Your orator, C. C. Mechem, being over twenty-one years of age, brings this his bill of complaint against J. T. Long and W. E. McKenzie, both of whom are residing at Kansas City, Missouri. First. Your orator shows unto your honor that he is peaceable possession of and claims to own and does own the following described land, situated in the county of Mobile, State of Alabama, to-wit: The North west quarter of Section 19, T. 1, S. R. 2, W., except six acres of aforesaid quarter section bounded as follows; on southwest by Mobile & Ohio right of way; on the north by the north section line; and on the east by a line twenty-five feet east of and parallel with Bickford's fence—said six acres being in shape of a triangle. Your orator

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further shows, alleges and charges that J. T. Long and W. E. McKenzie, deny or dispute the title of orator to the land above described or to some portion thereof, and claim, or are reputed to claim and own said above described land or some portion thereof, or some right, title or interest therein, or are reputed to claim or hold some lien or incumbrance on said land. Third. Your orator further alleges that no suit is pending to test or enforce the validity of said title, claim or incumbrance of the said J. T. Long and W. E. McKenzie. Fourth. Your orator calls on each of said claimants above named, or described, to set forth and specify his title, claim, interest or incumbrance, and how and by what instrument, or instruments, the same is derived and created. Fifth. Your orator alleges that both of the above named defendants are over twenty-one years old and are non-residents of Alabama, residing at the place named in the introductory part of this bill just before paragraph one. Sixth. Your orator further shows that he derives his title to said property in the following manner: The former owner of said land, M. S. Bickford, together with his wife, C. S. Bickford, on Feb, 27, 1896, entered into a contract with orator to convey said land to orator. This contract was executed on March 13, 1896, by orator paying out of his own money to said Bickford the consideration agreed upon and specified in said contract and by Bickford's executing, according to orator's instructions, a deed to said land to one Perry Duncan who did not contribute any thing toward said purchase money. It had been agreed between orator and Duncan that orator was to buy and pay for the lands with his own money, but take the title in the name of Perry Duncan, who was for the convenience of orator to hold the title to said lands for the benefit of orator and as a mere repository of said title; that said Duncan would execute deeds to such persons as orator should sell lands to, whenever called on by orator to do so, that in order to facilitate the sales of such lands as orator should take in the name of said Duncan, orator had said Duncan to execute the powers of attorney dated and recorded as follows (Here follow dates of powers of at-

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torney and books wherein they are recorded) Orator further alleges that the legal title to the land purchased from said Bickford was taken in the name of said Duncan under aforesaid arrangement and that said Duncan had no interest whatever in said lands but held the title to the same for the benefit of orator under aforesaid agreement. Seventh. Your orator further shows that on Sept. 16, 1903, said Perry Duncan conveyed by quit claim deed said land to one W. E. McKenzie, as per deed of record in deed Book, 105, N. S. p. 432 of Mobile County Records, and that on Sept. 16, 1903, the same day said McKenzie conveyed by quit claim deed the same land to one J. T. Long, as per deed recorded in said deed book 105, N. S., p. 431 of Mobile County Records." The bill then contains the usual prayers, in such cases, for process and, as stated in opinion, for relief. To this amended bill, defendant Long filed the following grounds of demurrer: 1. Said amended bill is inconsistent with itself and ambiguous in that the original bill avers that the complainant Mechem owns the land therein described, while the amendment shows that he does not. Second. Because the original bill shows that the complainant owns the lands therein described, while the amendment shows that Perry Duncan or his grantees own the legal title, and that Mechem does not. wherefore said bill is ambiguous and inconsistent with itself. 3. Because the amended bill shows that Perry Duncan became the owner of the property therein described, and that no valid trust or agreement constituting a trust was made by which "said Duncan had no interest whatever in said lands, but held the title to the same for the benefit of orator. Fourth. Because the amended bill is incomplete in essential particulars, in that it shows the existence of certain powers of attorney claimed to be material to the case made by the bill, but does not allege the substance thereof or set them out so that the court may be informed thereof. This Court should not be forced to hunt up the records in another office to ascertain the materiality and effect of said powers of attorney. Fifth. Because said agreement alleged to have been had

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between complainant and said Duncan is not shown to be in writing and is therefore void under the laws of the State of Alabama. Sixth. Because construing the bill as amended most strongly against the pleader, said agreement between complainant and said Duncan was not in writing and was therefore void under the laws of Alabama. Seventh. Because the bill as amended does not allege any fraud or deceit existing at the time said title was vested in Duncan. Eighth. Because said amended bill alleges no facts showing a resulting trust enforceable in equity. Ninth. Because said amended bill shows that complainant caused the title of record to be placed in said Perry Duncan and thereafter procured and recorded certain powers of attorney by said Duncan as principal and apparent owner, and complainant as agent, and then thereafter this defendant purchased by means of conveyance from Perry Duncan, and does not show any facts charging the plaintiff with notice of any infirmity in said Duncan's title. Because of these actual representations of Duncan's ownership made by complainant, no notice, constructive or otherwise, is chargeable against this defendant. Tenth. Because the bill as amended states facts showing that complainant is estopped to deny the title of Perry Duncan and his grantees." The defendant also filed the following plea "Said Perry Duncan made no agreement in writing with the complainant such as is set up in the bill of complaint, nor was any such agreement made for said Duncan by any person duly authorized thereto in writing. Nor did he make or authorize any person for him or in his name to make any such agreement as is set up in said bill of complaint in reference to the alleged description in said bill, and this defendant avers that said alleged agreement in reference to said land is void under the statutes of Alabama, and cannot be enforced against said Perry Duncan or his grantees." The court rendered an interlocutory decree, overruling each ground of said demurrer and overruling the plea set forth above. From this interlocutory decree, defendant appeals, and assigns the action of the court in overruling said plea and in overruling said demurrer, and each

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ground thereof, as error; the first assignment of error being the overruling of the plea; the second assignment, the overruling of the entire demurrer; the third, the overruling of the 1st ground; fourth, of the 2nd ground; 5th, of the 3rd ground; 6th, of the 4th ground; 7th, of the 5th ground; 8th, of the 6th ground; 9th, of the 7th ground; 10th, of the 8th ground; 11th, of the 9th ground; and the 12th assignment of error being the overruling of the 10th ground of the demurrer to the amended complaint.

FITTS & STOUTZ, for appellant.—There was a clear cut attempt to establish an express trust. Section 1041 requires that such trusts be in writing. Section 1041 nullifies all express trusts not in writing. An implied or constructive trust is one not created by the parties at all, but created by the conscience of the equity court.—*Potter v. Clapp*, 96 Am. St. Rep. 323-8; *Brock v. Brock*, 90 Ala. 86.

The amended bill is inconsistent with itself in that it shows that Mechem is the owner of the land, and, also, it shows that the defendant, through mesne conveyance from Duncan, owns the property, but sets up, or attempts to set up, a trust, under which complainant claims to be beneficiary. A trustee may pass, by conveyance, the legal title, whether according to the trust or in violation thereof. *Amberson v. Johnson*, 29 So. Rep. 176 (Ala.); *Huckabee v. Billingsly*, 16 Ala. 414; *McBrayer v. Cariker*, 64 Ala. 55.

The Statute of Frauds applies.—*Bolling v. Munchus*, 65 Ala. 561; *Bailey v. Irwin*, 72 Ala. 505; *Strouss v. Elting*, 110 Ala. 139; *Loveless v. Hutchinson*, 106 Ala. 417, 424; *Patton v. Beecher*, 62 Ala. 587; *Lehman v. Lewis*, 62 Ala. 129.

If the allegation concerning the powers of attorney is essential, the allegation should be made in such form that the court should be able to judge of the effect of the powers of attorney from a reading of the bill. The court is under no obligation to seek these matters elsewhere. The bill as thus framed is incomplete.

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ERVIN & MCALEER, and J. RALSTON BURGETT, JR., *contra*.—The bill alleges that complainant owns the land; that the legal title is in respondent who holds it in trust for complainant; in equity, the *cestui que trust* is considered the owner. The trusts of lands results by construction to him from whom the purchase money moves.—*Lehman v. Morris*, 62 Ala. 131; *Tillman v. Murrell*, 120 Ala. 244.

Code, Sec. 1041 expressly "excepts such trusts as result by construction of law." So such a trust as is alleged in the bill is not required to be evidenced by writing. The bill should state the facts, not the evidence necessary to establish them.

SIMPSON, J.—This is an appeal from an interlocutory decree, overruling demurrers and a plea. The original bill was filed, to remove a cloud from the title of complainant, and was afterwards amended by adding a section, setting up a resulting trust, but making no additional prayer.

The first assignment of error is based on the overruling of the plea, the substance of the plea being that the trust set up in the amended bill was not in writing and consequently void under section 1041 of the Code of Alabama, (1896).

The allegations of the amended bill show that the land, in question, was bought and paid for by the complainant, and the title taken in the name of one Duncan, under an agreement that Duncan was to hold the legal title for complainant, and to convey the land, whenever desired under complainant's direction.

The contention of the respondent is that the fact that there was a parol agreement in regard to said trust takes it out of the category of resulting trusts, and it is therefore void.

If the complainant had a resulting trust in the lands, from having paid the purchase money, and placed the title in the name of another, the mere fact that the party, in whom the legal title was vested recognized, by parol, the obligation to hold the land in trust, certainly could not destroy the resulting trust held by the complainant,

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by operation of law. In addition to this, the section of the Code provides that no trust in lands, not in writing is valid "*except such as result by implication or construction of law, or which may be transferred or distinguished by operation of law.*"

The inevitable result from the grammatical construction of the sentence is that, this class of trusts is excepted entirely from the operation of the section, and parol declarations of the parties regarding the same are admissible.

The distinction between this case and such cases as *Patton v. Beecher, et al.* 62 Ala. 579, and *Brock v. Brock*, 90 Ala. 86, is that these cases correctly hold that the "*mere verbal promise, by the grantee of a deed for lands, absolute on its face*" will not take it out of the requirements of the statute. while this case comes under another principle of law, equally well established, and recognized in the exception contained in the statute under consideration, to wit; that "*if the purchaser of lands, paying the purchase money, takes the conveyance in the name of another, the trust of the lands results, by construction to him from whom the purchase money moves.*"—*Lehman, et al v. Lewis*, 62 Ala. 129, 131; *Tillman v. Murrell, et al.*, 120 Ala. 239.

It is true that in the last named case, as counsel for appellant say, the lands had been conveyed in accordance with the parol agreement, but the case was decided distinctly on the principle that Murrell held the legal title in trust for the party who paid the money for it, "not by virtue of the parol agreement, but because of their having paid the consideration."

There was no error in the decree of the court as to said plea.

The second assignment of error is included in the others. The third and fourth assignments of error, referring to the overruling of the first and second grounds of demurrer, raise the point that the bill, as amended is inconsistent with itself. These assignments are sustained.

The bill as originally filed, is a bill to quiet title, under

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the statute. Alleging that complainant has title and is in possession, that Long and McKenzie (who claim under quit claims from Duncan), have no right, title, estate or interest in the land, and prays that they be required to show what claim or title they have, and that the court will settle, quiet and establish complainant's title to said land, and decree that Long and McKenzie have no title, etc. While the amendment alleges that the legal title is in Long and McKenzie, but that they hold it, in trust for him, and the bill contains no appropriate prayer for the enforcement of said trust. The complainant should have amended his bill so as to rely on either one or the other of the theories stated, and his bill should be amended so as to pray for the appropriate relief. .

Referring to the sixth assignment of error: The complainant should have stated the substance of the powers of attorney with sufficient definiteness to have informed the defendant what they contained, in order that they might have been able to judge whether to admit or deny the allegation. Therefore, the 4th ground of demurrer was well taken, and should have been sustained.

The 5th, 7th, 8th, 9th and 10th assignments of error raise the same points heretofore discussed under the 1st assignment.

The 11th and 12th assignments of error cannot be sustained because; 1st, the powers of attorney referred to are not set out, or their substance given, so that the court cannot determine what their force and effect might have been; and 2nd, the matters alleged in the demurrers relate rather to the probative force of said powers of attorney than to the sufficiency of the pleading in which they are mentioned, and under a previous assignment we have held said pleading insufficient.

The decree of the court is reversed and the cause remanded.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

[Carter *et al.* v. Smith.]**Carter *et al.* v. Smith.***Statutory Action of Ejectment.*

1. *Ejectment; what necessary for plaintiff to recover when title based on sheriff's deed.*—In an action of ejectment where the plaintiff bases his right of recovery upon a sheriff's deed made after a sale under an execution, it is necessary in order for the plaintiff to recover, for him to show that there was a valid judgment, execution, levy, sale and deed, and that the defendant, in the judgment to whose title plaintiff succeeded, had an estate or interest in the lands which was subject to levy and sale.
2. *Judgment; amendment nunc pro tunc.*—Where a judgment is amended nunc pro tunc, an execution issued upon said judgment properly recites the date of the original judgment as the date of the rendition of the judgment on which it was issued; and such an execution is admissible in evidence in an action of ejectment by the purchaser at a sale under said execution to recover the lands so sold.
3. *Mortgage; assignment thereof; title does not revert by erasure of assignment.*—Where a mortgage is assigned by the mortgagee endorsing the assignment on the back of such mortgage, which assignment is duly acknowledged before a notary, and subsequently the assignee redelivered the mortgage to the mortgagee, and erased from the assignment endorsed thereon, the name of the assignee, such erasure and delivery of the mortgage does not have the effect to reinvest the title in the mortgagee, but the title remained where the assignment had placed it.
4. *Ejectment; purchaser of equity of redemption.*—The purchaser of the equity of redemption at a sheriff's sale can maintain ejectment against the mortgagor, and the mortgagor is not allowed to set up an outstanding title in the mortgage to defeat such action; but such purchaser cannot maintain an action of ejectment against the mortgagee.
5. *Action of ejectment; admissibility of evidence.*—In an action of ejectment brought by the purchaser at a sheriff's sale against one who claims under a mortgage, it is competent for the defendant to show that whatever title the defendant in

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execution owned, it passed from him before the levy and sale under the execution to plaintiff, and this is true, although the mortgage was assigned after the suit was commenced, in which the judgment was recovered upon which execution issued.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. J. C. RICHARDSON.

This was a statutory action of ejectment brought by the appellee, Mary R. Smith, against George M. Carter, J. J. Carter and Ella V. Carter, to recover certain lands specifically described in the complaint; the court based its claim of title, and its right of recovery of the lands in suit to a sheriff's deed purporting to convey said lands, which deed was made to the plaintiff as purchaser at the sheriff's sale of said lands under an execution issued under a judgment recovered against one A. R. Carter.

The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the general affirmative charge in her behalf, to the giving of which charge, the defendant duly excepted. There were verdict and judgment for the plaintiff.

The defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

G. R. FARNHAM & J. F. JONES, for appellant.—To recover under a sheriff's deed, "plaintiff must show or prove, a judgment, levy, sale, deed and possession by defendant in execution at the time of the levy and sale.—*Elliott v. Dycke*, 78 Ala. 150. Plaintiff must show that the defendant in the judgment, to whose title he succeeds, has an estate or interest in the lands which was subject to levy and sale.—*Mickle et al. v. Montgomery*, 111 Ala. 115; *Id.* 418; *Ala. Min. Land Co. v. Baker*, 119 Ala. 351.

No counsel marked appearing for appellee.

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DENSON, J.—“To authorize a recovery on a sheriff’s deed in an action of ejectment, there must be a valid judgment, execution, levy, sale and the deed.” It must also be shown by the plaintiff that the defendant in judgment, to whose title plaintiff claims to succeed has an estate or interest in the lands which was subject to levy and sale.—*Carrington v. Richardson*, 79 Ala. 101; *Mickle v. Montgomery*, 111 Ala. 415, and authorities there cited.

In this case the plaintiff, Mary R. Smith offered in evidence a judgment which was rendered by the circuit court of Conecuh county, on the 9th day of October, 1901, in favor of W. E. Smith, against A. R. Carter & Co., and in connection with the judgment a motion made by plaintiff in the judgment, at the spring term, 1902, of said court, to amend the judgment *nunc pro tunc*, and also the judgment of the court rendered at the Spring Term, 1902 on said motion purporting to amend the judgment. This record evidence was introduced without objection. Plaintiff then offered as evidence an execution on the judgment which bears date of issuance April 22nd. 1902. To this execution as evidence the defendant objected upon the ground, that it showed that it was issued on the original judgment obtained in October, 1901, and not on the judgment as amended at the spring term, 1902.

“The object of a judgment *nunc pro tunc* is not the rendering of a new judgment, but only placing in proper form on the record the judgment that had been previously rendered. Hence, for many purposes, such judgments are made to relate to, and take effect from, the time when the judgment was erroneously (originally) rendered.” In this case we think the execution properly recited the date of the original judgment as the date of the rendition of the judgment on which it was issued. The objection was properly overruled.—*Dumas v. Hunter*, 30 Ala. 188; *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268.

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The execution was levied by the sheriff on the lands described in the complaint, as the property of A. R. Carter, and after advertisement, sale was made of the property to satisfy the execution. At the sale the plaintiff, Mary R. Smith, became the purchaser, and the sheriff executed her a deed to the property which deed was offered in evidence. Plaintiff then offered in evidence a deed from H. S. Derby and Jennie Derby to A. R. Carter, the defendant in execution to the lands sued for, the deed bears date December 24, 1898, and was recorded in the office of the judge of probate of Conecuh county, the 20th day of August, 1901. There was proof that A. R. Carter went into possession of the property conveyed by the deed about the 1st of January, 1899, and remained in possession several years.

The proof for the defense showed that the defendant George M. Carter was in possession of the land sued for at the time the suit was commenced, and that his co-defendants, who were his father and mother, lived with him on the land, that he went in possession in November, 1901, and had been in continuous possession since that date. After proving its execution, the defendant, George M. Carter, offered in evidence a mortgage covering the premises sued for, executed by A. R. Carter to him on the 14th day of September, 1901. This mortgage was recorded in the office of the judge of probate of Conecuh county on the 7th day of October, 1901. The law day of the mortgage was October the 1st, 1901. It was shown that A. R. Carter was in possession of the property when he executed the mortgage and that he delivered the possession to George M. Carter about November 1st, 1901. There was proof of the consideration of the mortgage.

This mortgage was assigned by the mortgagee to J. F. Jones on December 11th, 1902, and the assignment was endorsed on the back of the mortgage, and was duly acknowledged by the mortgagee before a notary public. The mortgage with the assignment as written and executed was delivered by the mortgagee to J. T. Jones, and undoubtedly passed the title that the mortgagee had in the lands to the assignee. Jones testified that in December, 1902, he had some claims amounting to several hun-

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dred dollars, for collection against George M. Carter and agreed with Carter that if he would secure him he would advance him the money to pay the claims, and that in accordance with the agreement the assignment of the mortgage was made by Carter and the mortgage was delivered to him (Jones). That after the mortgage was delivered, but before Jones had let Carter have any money, Carter came to him and paid the claims off and that he then turned the mortgage back to Carter. He further testified that he made the erasure on the assignment. It appeared that the name of the assignee had been erased. Jones testified that he never reconveyed the property to Carter. The erasure of the name of the assignee and the delivery of the mortgage back to Carter did not have the effect to reinvest the title in him, but the title rested where the assignment placed it.—*Gulf Red Cedar Lumber Co. v. O'Neal, et al.*, 131 Ala. 117.

It has been observed that the execution offered in evidence was issued and levied after the execution by A. R. Carter of the mortgage to George M. Carter and after the law day of said mortgage, and after the possession had been delivered to George M. Carter under the mortgage. At the time the levy and sale was made, the defendant in execution had only an equity of redemption. This by express provision of the statute, Code 1896, § 1890, was subject to levy and sale under execution, and while under the statute the purchaser is subrogated to all the rights of the defendant, by the same statute he is subject to all his disabilities.

As against the mortgagor the purchaser of the equity of redemption at sheriff's sale may maintain ejectment, and the mortgagor will not be allowed to set up an outstanding title in the mortgagee to defeat the action. But the action could not be maintained against the mortgagee.—*Cotton v. Carlisle*, 85 Ala. 175; *Marks v. Robinson*, 82 Ala. 69.

Under the evidence, the plaintiff, at the commencement of this action, as against the defendant, George M. Carter, neither had the title nor the right to the posses-

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sion, hence, he was not entitled to recover.—*Cofer v. Schening*, 98 Ala. 338; 2 Brick. Dig. p. 324, § 27.

The defendant Carter went into possession under the mortgage and held under it, and it was competent evidence to show that whatever legal title A. R. Carter owned had passed from him before the levy and sale under execution notwithstanding the mortgage was assigned to Jones, it having been assigned after the suit commenced.—*New England Mortgage Security Co. v. Clayton*, 119 Ala. 361; *Cooper v. Price*, 123 Ala. 392.

We have in our consideration of the case, assumed that the mortgage was valid, at least under the evidence, the court could not as matter of law instruct the jury that it was invalid.

From the foregoing it follows, that the court erred in giving the affirmative charge for the plaintiff and the judgment of the circuit court must be reversed.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DOWDELL, J.J., concurring.

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Action of Trover.

1. *Trover; elements of conversion; when sufficient demand not shown.*—When personal property has been placed by the owner in possession of another, before the latter can be guilty of conversion, the evidence must show that a demand has been made by the owner or his agent, for the return of the property, and that the holder thereof has refused to surrender the same; and in an action of trover for the wrongful conversion of such property, where the evidence shows that a demand was made for its return by the attorney who instituted the suit, and such demand was refused, but there is no proof that the attorney had authority from the owner of the

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property to make the demand, there is not shown such a demand of the property as will authorize the recovery in an action of trover.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This was an action of trover brought by the appellees, Mrs. Allie, Nellie and Sarah Johnston, against the appellant, the Jesse French Piano & Organ Company, to recover damages for the alleged conversion of a piano.

On the trial of the case, it was shown that the piano in question was delivered to the defendant during the negotiation of a sale by the defendant to the plaintiffs of a new piano; but that this sale was not consummated, and the new piano which was placed in the home of the plaintiffs was returned by them to the defendant.

The only question involved on the present appeal is whether or not there had been a demand made upon the defendant for the return of the piano, and a refusal of this demand. The suit was brought for the plaintiff by their attorney, George Stowers, Esq. Upon being examined as a witness, Mr. Stowers testified as follows: "That before the bringing of the suit, he called upon Mr. A. G. Forbes, the manager of defendant and demanded the piano in the name of E. E. Forbes and that Mr. Forbes refused to give it up, saying he would look the matter up and let him know, and that later on he demanded the piano of Mr. A. G. Forbes in the name of these plaintiffs and that he refused to give it up." This was the only testimony in reference to a demand by Stowers, and there was no other evidence introduced as to his having any authority.

It was shown by the evidence that the plaintiffs purchased a piano from E. E. Forbes, and authorized him to get the old piano from the defendant.

The cause was tried by the court without the intervention of a jury and upon the introduction of all the evidence, judgment was rendered in favor of the plaintiffs. From this judgment the defendant appeals, and assigns the rendition thereof as error.

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RAY RUSHTON, for appellant.—The evidence does not show such a detention of property by the defendant as authorized a conversion. It is not shown that Stowers had authority to make demand for the return of the piano.—*Conner & Johnson v. Allen & Reynolds*, 33 Ala. 515; *Butler v. Jones*, 80 Ala. 436; *Thweat v. Stamps*, 67 Ala. 69; *Bolling v. Kirby*, 90 Ala. 215; *Lorke v. Reeves*, 116 Ala. 590; *Glaze v. McMillan*, 7 Porter 279.

GEORGE STOWERS, *contra*.—The judgment in this case was correct. It is shown that the defendant unlawfully converted the piano to his own use. There was a demand made for the surrender of the piano, which was refused by the defendant.—*Mitchell v. Thomas*, 114 Ala. 559; 26 Am. & Eng. Enc. of Law, pp. 714 & 726.

ANDERSON, J.—This was an action of trover for the conversion of a piano, and the case was tried by the judge without a jury and judgment was rendered in favor of the plaintiff for \$75.00. The evidence establishes the ownership of the plaintiffs to the property and that defendant acquired possession thereof through their servant, and the sole question presented for review is, was there such a demand and refusal as would make the defendant a *tortfeasor* and guilty of a conversion?

All conversions are divided into four distinct classes, "1st; by a *wrongful taking*, 2nd; by an *illegal assumption*, 3rd; by an *illegal user or misuser*, and 4th; by a *wrongful detention*." In the three first named classes, there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant is sufficient to prove the conversion. In the latter class alone is such evidence of demand and refusal to be required, as the detention of a chattel furnishes no evidence of a disposition to convert to the holder's own use, or to divest the true owner of his property."—*Strauss & Sons v. Schicab, et al.*, 104 Ala. 669; *Butler v. Jones*, 80 Ala. 436; *Bolling v. Kirby & Bro.*, 90 Ala. 215; S. C. 24 Am. St. Rep. 789; and note; *Moore v. Refrigerator Co.*, 128 Ala. 621; 2 Greenleaf on Evidence, 644.

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In other words, the proof should show that the demand was made by one, a delivery to whom would relieve the defendant of any liability to the owner. The burden is on the plaintiff to establish a conversion and when it is based on a demand and refusal, the proof should show that demand was made by one who had authority to make it. The demand in this case was made by one, Stowers, first for E. E. Forbes and then for the plaintiffs and there was no proof that Stowers had authority to make the demand either from plaintiffs or Forbes, although plaintiffs did authorize E. E. Forbes to get it. We do not think that we can presume the authority of Stowers simply because he brought the suit for the plaintiffs, as the bringing of the suit does not establish an authority for doing things prior thereto, and in this case the witness does not testify that he was the attorney or that he was acting in that capacity at the time of the demand.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

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Common Law Action of Ejectment.

1. *Husband and wife; power of wife to alienate lands, includes power to mortgage.*—The general power of a married woman to alienate her lands with the assent and concurrence of her husband, as conferred by the act approved Feb. 28th, 1887, "To define the rights and liability of the husband and wife," confers upon a married woman the unlimited power of alienation, so far as the character of the conveyance is concerned, and includes the power to execute a mortgage or deed of trust to secure her debts.
2. *Conveyance by corporation; effect of corporate seal.*—In the execution of a written instrument by a corporation, the corpo-

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rate seal attached to such instrument is a sufficient testimonial of the authority of the person who signs the corporate name as its president to so execute the paper.

3. *Deed of trust; presumption after foreclosure.*—Where a deed of trust given to secure the payment of a debt recites that upon the written request of the beneficiary after default in the payment of the debt, the trustee should take possession of the property and sell it in execution of the trust, if the debt secured by the deed of trust is transferred by the beneficiary, and subsequently upon default in the payment of the debt, the trustee executes the trust by selling the property, and at the sale the assignee of the original beneficiary becomes a purchaser, to whom the trustee executes a deed, it will be presumed that the execution was according to the request of the assignee properly and regularly made known to the trustee.
3. *Husband and wife; res adjudicata as to mortgage being given to secure husband's debt.*—Where in a suit in equity one of the issues involved is whether a mortgage executed by a married woman, conveying her separate property, was given to secure the debt of her husband, and in the decree rendered it was ascertained that said mortgage was not given to secure the husband's debt, such question becomes *res adjudicata* as between the mortgagor and persons claiming under the mortgage; and the fact that such decree was appealed from and was pending at the time of an action of ejectment for the lands included in the mortgage, but was not superseded, does not authorize the introduction in the ejectment suit of evidence touching the issue as to whether the mortgage was given to secure the husband's debt, which was adjudicated by the decree in the chancery court; but a record of the proceedings in said chancery suit is admissible in evidence.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

This was a common law action of ejectment brought by the appellee, Mrs. N. M. F. Alexander, against the appellant, Mrs. E. F. S. Collier, to recover certain lands specifically described in the declaration. In the declaration there was made three separate and distinct demises, one being laid in the Rome Fire Insurance Company, one in L. B. Stone as trustee, and the third in N. M. F. Alexander. The defendant pleaded the general

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issue of not guilty, and the trial was had upon issue joined upon this plea.

The plaintiff offered in evidence a certain deed of trust, executed and signed by Mrs. E. F. S. Collier, and her husband, B. F. Collier, to one L. B. Stone, as trustee, to secure an alleged indebtedness to Hamilton Yancey, Secretary and Treasurer of the Rome Fire Insurance Company. This deed of trust was executed on Jan. 30th, 1891, and was duly filed for record in the probate office of Etowah county on Feb. 16th, 1891. The deed of trust recites an indebtedness to said Yancey as secretary and treasurer of the Rome Fire Insurance Company, and conveyed the lands involved in this controversy which were described as belonging to Mrs. Collier. The deed of trust also contained the provision that if the debt it was given to secure, or any part of it, should remain due and unpaid at maturity, then upon the written request of said Hamilton Yancey as said Secretary and Treasurer, the said trustee should take possession of the property and after giving due notice sell the same at public outcry, &c. The defendant objected to the introduction of this instrument in evidence because it was incompetent and inadmissible testimony, and because said instrument was insufficient to convey the legal title for the reason that the property belonged to Mrs. Collier, who was a married woman at the date of the instrument, and the name of her husband did not appear in the body of the deed, as a grantor; and further because at the date of the execution of said instrument, Mrs. Collier was a married woman and had no power in law to mortgage her real estate. Thereupon the plaintiff introduced B. F. Collier, the husband of Mrs. Collier, who testified that at the time of the execution of said deed of trust, he and his wife were residents of the State of Georgia. The court thereupon overruled the defendant's objection, and to this ruling the defendant duly excepted.

The plaintiff then offered in evidence a certain transfer of this deed of trust made by the Rome Fire Insurance Company to the plaintiff, dated March 21st, 1896. The transfer recited a consideration of \$450 paid by the plain-

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tiff to the Rome Fire Insurance Company, and transferred and assigned the deed of trust to Nellie F. Alexander. It was signed "The Rome Fire Insurance Co., by J. L. Bass, Pt., (Seal)." There was also affixed thereto the corporate seal of the Rome Fire Insurance Co., and was duly acknowledged by said Bass before a notary public. The defendant objected to the introduction in evidence of this transfer of said deed of trust upon the ground that it was not shown that the person who signed such transfer had authority to so transfer said deed of trust, and because it does not appear that the same was a duly authorized corporate act. The court overruled this objection, and the defendant duly excepted. The plaintiff then offered in evidence a deed executed by L. B. Stone as trustee to the plaintiff, dated Oct. 20th, 1900. This deed recited that the trustee had "been requested in writing by the attorney of the beneficiary in said deed of trust to execute the trust imposed in him by said deed of trust," and that the property conveyed in said deed of trust was sold by reason of default being made in the debt secured thereby, and that at said sale the plaintiff, N. M. F. Alexander, had become the purchaser thereof. This deed thereupon conveyed the property to the plaintiff. The defendant objected to the introduction of this deed in evidence upon the ground that it was not shown that Yancey, as Secretary of the Rome Fire Insurance Co., had requested in writing the trustee to foreclose said deed of trust and because the same was inadmissible and irrelevant. The court overruled this objection, and the defendant duly excepted. The plaintiff then offered in evidence the bill of complaint filed by the defendant against the plaintiff under the statute, in which bill the defendant sought to have determined her claim to the property in controversy; and also introduced in evidence the answer and decree of the court in said cause. It was shown by said proceedings that there was involved in the hearing of said cause the question as to whether or not the deed of trust was given to secure the payment of a debt of defendant's husband, and that in said decree it was declared that the deed of trust was not given for said purpose, and that

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the debt was the indebtedness of the defendant. To the introduction of these papers in evidence, the defendant objected upon the ground that the same were inadmissible, and that the decree rendered in said cause had been appealed from, and that the same had been superseded. It was shown that the decree had not been superseded. The court overruled the objection, and to this ruling the defendant duly excepted. The defendant offered to introduce evidence tending to show that the deed of trust which was introduced in evidence was given by her to secure an indebtedness due from her husband, and that she signed said mortgage at the request of her husband. The plaintiff objected to the introduction of this evidence. The court sustained the objection, and the defendant duly excepted. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the general affirmative charge in her behalf, and refused to give the general affirmative charge requested by the defendant. To each of these rulings the defendant separately excepted.

There were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

CALDWELL & JOHNSON and S. W. JOHNSON, for appellant.—The transfer by the Rome Fire Insurance Company to the plaintiff in this case was not shown to have been properly executed.—*Jimwright v. Nelson*, 105 Ala. 399; *B. & L. Association v. Smith*, 122 Ala. 502.

BURNETT, HOOD & MURPHREE, *contra*.—The evidence as to whether the deed of trust was executed by the defendant to secure the debt of the husband, was not admissible in evidence. This question had been adjudicated in the chancery suit between the same parties and the proceedings of said chancery suit were admissible in evidence.—*Penny v. British Am. Mortgage Co.*, 31 So. Rep. 96; *Tankersly v. Pettis*, 71 Ala. 179; *Moon v. Crowder*, 72 Ala. 79; *Strang v. Moog*, 72 Ala. 464.

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McCLELLAN, C. J.—Prior to 1887 the statute confined the husband and wife's power of alienation of her land to *a sale*, and provided the uses to which the proceeds of the sale should be devoted.—Revised Code, § § 2373, 2374. The act of the year named, "To define the rights and liabilities of husband and wife," confessedly was intended and obviously has the effect to enlarge the wife's capacity in respect of her property. By it she is given the full legal capacity to contract as if she were sole, with the assent or concurrence of her husband expressed in writing. By it also the general power to *alienate* her lands is conferred upon her with the assent and concurrence of the husband, evidenced by his joining in the conveyance. There is nothing in the text of this statute nor any consideration that can be evolved out of its policy to enforce, or even persuasive to a conclusion which would limit the power thus given to alienations by sale or to conveyances in effectuation of sales. The essential word employed, "alienate," applies as well and aptly to all conveyances of title as to those conveyances which are made upon a sale. A deed of trust to secure a debt conveys the title to the trustee. A mortgage carries the title to the mortgagee. And each is as much an alienation of land, and within a power to alienate land as is a conveyance in fee to a purchaser. This is what the statute of 1887 meant when it was enacted. The fact that the legislature subsequently saw fit to amend it by adding the words "or mortgage" after the word "alienate" could not have the effect to take from the latter word as it was originally employed any part of its meaning in the act of 1887. At most that was a mere legislative construction or interpretation of an existing statute which is not binding on the courts in dealing with the original statute. But it is probable that the legislature itself did not intend to commit itself to that construction, but enacted the amendatory statute merely out of abundant caution, and to clear up all doubt that might have arisen upon the decisions of this court under the married womans' statutes prior to 1887 to the effect that the power of *sale* there conferred did not embrace the power to mortgage. So we are of the opinion that

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the act of 1887 conferred upon married women the unlimited power of alienation so far as the character of the conveyance is concerned. the power to alienate by conveyance to secure her debts as well as by conveyances in fee upon a sale. At the time of its execution, therefore, though prior to the amendment to which we have referred, Mrs. Collier had capacity to convey the land here involved to Stone in trust to secure the payment of her debt to the Rome Fire Insurance Company, and her husband being a non-resident it was not necessary that he join in the execution of the deed of trust, so it is unnecessary to consider whether there was a joinder of the husband in the conveyance.

The plea of not guilty, involving, as it did, confession of lease, entry and ouster, left the plaintiff with the burden only of proving title and right of possession on one of the alleged lessors. We are of opinion that this burden was discharged beyond controversy in respect of the lessor, N. M. F. Alexander. There is no question but that the Rome Fire Insurance Company was the beneficiary in the deed of trust, though the party named as such was its secretary and treasurer. That company had a right to transfer its debt secured by the instrument and the security, so to speak, which the deed of trust afforded. The corporate seal attached to the instrument of transfer is a sufficient testimonial of the authority of the person who signed the corporate name as its president to so execute the paper. After such transfer the secretary and treasurer of the company ceased to have the authority conferred on him by the deed of trust to make demand in writing upon the trustee to take possession of the land and sell it in execution of the trust. If the trustee was then under any control in respect of such execution, it was the control of Mrs. Alexander, the transferee of the debt and security. The trust having been executed and Mrs. Alexander having become the purchaser at the sale made in its execution, it is presumed that the execution was according to her desire, and also that her wish or demand was properly and regularly made known to the trustee, if that be important. The purchase thus

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made by her consummated by the deed executed to her by the trustee vested in her the legal title to and the right to the immediate possession of the land.

Of course, it was originally open to Mrs. Collier to show that this deed of trust was void because executed to secure the debt of her husband; but the issue was foreclosed against her by the decree in chancery introduced in evidence on this trial, whereby it was adjudged that the deed of trust was not executed to secure the husband's debt, and was a valid conveyance of her land. That decree was appealed from, and the appeal was pending at the time of the trial of this case, but it does not appear that it was superseded pending the appeal. It was not a void decree, as counsel contend, nor even erroneous, as has since been decided by this court. The trial court did not err in receiving the record in that case, and the opinion of the chancellor showing precisely what was decided, in evidence, nor in thereupon excluding the defendant's proposed evidence touching the issue which the decree adjudicated.

The uncontroverted evidence showing title and right of possession in N. M. F. Alexander in whom one of the demises declared on was laid, the plaintiff was entitled to the affirmative charge; it is unnecessary to consider other rulings of the City court on the trial.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Action upon a Judgment.

1. *Action upon a judgment; sufficiency of complaint.*—In an action upon a judgment, the complaint is sufficient if it sets forth the court by which the judgment was rendered, the place at which the court was held, the names of the parties, plaintiff and defendant, the date of its rendition, and the amount recovered; and it is not necessary in such a com-

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plaint to allege any particular reason for bringing the action upon the judgment theretofore recovered, other than that it was unpaid.

2. *Action upon a judgment; can be maintained within a year and a day.*—An action can be maintained upon a judgment within a year and a day from its rendition, which is before the expiration of the time after the rendition of the judgment within which an execution could be issued thereto to enforce it.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. A. H. ALSTON.

This action was brought by the appellant, Louis Kaufman, against William Richardson. The complaint was in words and figures as follows: "The plaintiff claims of the defendant the sum of seven and 60-100 dollars, due from him on and by a judgment containing a waiver of exemptions of personal property, wages and salary, rendered in favor of plaintiff against the defendant, in the sum aforesaid, on the 24th day of July, 1903, in the justice court of J. B. Wilson, a justice of the peace, Demopolis Beat, Marengo County, Alabama, which said judgment, with interest, is still unsatisfied, due and unpaid." In the circuit court the defendant demurred to the complaint, among others, upon the following grounds: 1. Because said complaint shows on its face that it is based on a judgment and that said judgment was recovered less than a year before the filing of this suit. 2. Because said complaint shows on its face that this suit was prematurely brought. 3. Because said complaint shows on its face that it is based on a judgment recovered by the plaintiff against the defendant on the 24th day of July, 1903, and fails to aver any facts showing any necessity for suing on said judgment. 4. Because no action lies on a judgment in Alabama, until a year and a day after the rendition thereof, and said complaint shows on its face that the judgment which is the foundation of this suit was recovered on the 24th day of July, 1903. 5. Because said complaint fails to allege or show that there is any necessity for maintaining said suit on said judgment therein

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described, and fails to allege or show that there is any necessity for maintaining said suit on said judgment therein described, and fails to allege or show that any advantage or benefit therein described will accrue to the said plaintiff by reason of said suit. The demurrer to the complaint was sustained and thereupon the plaintiff declining to plead further, judgment was rendered in favor of the defendant.

From this judgment plaintiff appeals, and assigns as error the sustaining of the demurrer to the complaint.

ABRAHAM & SIMON, for appellant.—An action can be maintained on a judgment, although the time has not expired in which, under the common law, an extension would issue to enforce it.—*Field v. Sims*, 96 Ala. 540; 12 Am. & Eng. Ency. Law (1st Ed.) p. 149j; *Marx v. Sanders*, 98 Ala. 500-503; 12 Am. & Eng. Enc. Law (1st Ed.) p. 149j; notes 5 and 6; 18 Ala. 519.

The complaint is sufficient and it was unnecessary to allege any reason for bringing the suit other than that alleged in the complaint, to-wit: that the judgment was unpaid.—12 Am & Eng. Enc. Law (1st Ed.) § 41, pp. 149j and 149k, and note 1 p. 149 k; 95 Ala. 145.

MCDANIEL & POWELL, *contra*.—There is no reason or just ground for allowing a plaintiff to sue on a judgment in this State immediately upon its rendition, without averring some reason or necessity therefor. To allow such an action is contrary to the theory and intent of our laws. The plaintiff has every remedy on his original judgment that he could possibly have under a new judgment. The common law rule that no interest can be recovered on a judgment does not exist in this State. Is it fair, or humane, to allow a plaintiff to pile up costs on a defendant without any benefit to himself? Upon the following authorities the court did not err in sustaining defendant's demurrers.—*Pitzer v. Russell*, 4 Oregon 12; *Lee v. Giles*, 1 Bail. (S. C.) 449; *Kingsland v. Forrest*, 18 Ala. 519; Dissenting opinion; *Solen v. Virginia*, etc. R. R. Co. 15 Nev. 313; *Vandiver v. Hammon*, 4 Rich. L. (S. C.) 509; *Shooter v. McDuffin*, 5 Rut. L. (S. C.)

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61; *Ligon v. McNeil*, 6 Rut. L. (S. C.) 377; 32 Kans. 439; 75 Tex. 278; 80 Iowa 225; 144 N. Y. 326.

DOWDELL, J.—The action in this case was commenced in the justice court, and was brought on a judgment, which the plaintiff had recovered against the defendant in another different justice court. The present case was carried into the circuit court by the statutory writ of certiorari. In the latter court a demurrer was sustained to the complaint, and the plaintiff declining to further plead, a judgment was rendered on the demurrer in favor of the defendant, and from this judgment the plaintiff prosecutes this appeal.

Among other things, the demurrer, which was sustained by the circuit court, challenged the sufficiency of averments in the complaint. The demurrer in this respect was bad. The complaint contained every essential averment in a suit on a judgment.—*Andrews v. Flack & Wailes*, 88 Ala. 294.

The main and important question presented by the demurrer, and insisted on in argument, is, whether an action can be commenced on a judgment within a year and a day, or in other words, before the expiration of the time after the rendition of the judgment, within which an execution could be issued on the same. A similar question was considered by this court as far back as 18 Ala., in *Kingsland & Co. v. Forrest*, 519. In that case the question was, whether an action of debt would lie in this state on a judgment, rendered more than a year and a day, but less than ten years from the institution of the suit, and on which execution had issued within the year and been returned no property found. After a review of the authorities, the conclusion was reached, that in such a case, the action would lie. In that case, in the opinion by DARGAN, C. J., it is said, that the decided weight of American authority is that debt will lie on the judgment within the year and a day. This seems sound doctrine, and we are unable to see any good reason for a contrary view. It is a logical sequence to the conclusion reached in *Kingsland & Co. v. Forrest*, *supra*. In that

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case, the plaintiff having taken execution on his judgment within the year, had his right to another execution at the time suit was brought, just as much as the plaintiff who sues on the judgment within the year from its rendition, that being the time, within which execution may issue. The judgment is in the nature of a contract, and the obligation is on the defendant to satisfy it from the time of its rendition if not legally stayed, and it is due from that time. It is no argument to say that the plaintiff should not be permitted to oppress the defendant with the costs of another suit on the judgment, and a complete answer is, that the defendant may avoid this by satisfying the judgment.

In *Field v. Sims*, 96 Ala. 540, it was said: "The weight of authority is in favor of the view that an action can be maintained on the judgment, although the time has not expired in which, under the common law, an execution could issue to enforce it."—12 Am. & Eng. Ency. Law, 149. Furthermore, it was said in *Kingsland & Co. v. Forrest*, *supra*: "The remedy given by the statute is cumulative merely, and a plaintiff may, if his judgment be not satisfied, sue in debt upon it, although he could, under the statute, issue an alias execution." In *Field v. Sims*, *supra*, which was an action on a judgment obtained before a justice of the peace, it was held that the statute of limitations began to run from the date of the rendition of the judgment. And this could not be unless the right of action on the judgment had accrued, since the statute of limitations, as a rule, only commences to run from the accrual of the right of action. See also, *Marx v. Sanders*, 98 Ala. 500.

Our conclusion is that the circuit court erred in sustaining the demurrer to the complaint, and for this error the judgment must be reversed.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DENSON, J.J., concurring.

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Matthews *et al.* v. Mauldin *et al.*

Bill by Wards against Guardian and Sureties of Bond to Compel Settlement.

1. *Guardian and ward; jurisdiction of probate courts and of chancery courts.*—The jurisdiction of the probate courts and courts of chancery are concurrent in matters of guardianship, and the ward has an unqualified right of electing the forum in which he will seek a settlement of the guardianship.
2. *Same; when final settlement in probate court void.*—When final settlement made in the probate court by a guardian before his resignation or removal, and during the minority of the ward, is void for want of jurisdiction of said court.
3. *Liability of different sets of sureties on guardian's bond.*—A bill by a ward against the guardian and several sets of sureties on his bond is not bad on the ground for misjoinder, and multifariousness.
4. *Same; execution of bond.*—A guardian's bond executed by the bondsmen and not by the guardian is good as a common law liability.
5. *Same; liability of sureties on the first bond.*—The sureties on the old bond of the guardian are liable for any *devastavit* prior to their release on the approval of the new bond.
6. *Same; liability of new bondsmen.*—The sureties on a new bond of a guardian are liable on said bond for misappropriations by the guardian before the making of a new bond upon the ground of the guardian's obligation to make a true account.

APPEAL from the Chancery Court of Dale.

Heard before the Hon. W. L. PARKS.

This was a bill in equity filed by Whiteford Mauldin and Mary Mauldin, minors, by their guardian and next friend, L. C. Mauldin, against W. G. Matthews, S. M. Blackmon, W. B. Sanders, R. F. Harper, J. N. Mosely, Jasper Garner, J. N. Sandsbury, D. G. May and W. R. Painter, for the purpose of bringing Matthews, their guardian, to a settlement. The bill alleged that the complainants were minors, and that Matthews on the 10th day of May, 1893, had been appointed by the probate

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judge of Dale county, their guardian and that he had given bond in a certain amount with the respondents, Blackmon, Sanders, Harper, Mosley, Garner and Sandsbury, as sureties. That on the 2nd of June thereafter, Blackmon filed a petition in said probate court against Matthews, praying that Matthews give a new bond, and that the said Matthews on the 3d day of July next thereafter filed a bond which was approved by the probate court, said bond being executed by D. G. May, W. R. Painter, and J. N. Sandsbury as sureties, Matthews himself not signing the same; that there was no order of the probate court discharging said first bondsmen; that thereafter the probate court of Dale county ordered Matthews to give a new bond and to make a final settlement and upon the said Matthews' failure to come in court, the court proceeded to state the account, and rendered a decree for a certain amount in favor of the complainants, and also reciting in said decree that the said Matthews was removed as such guardian for having failed to make bond.

Painter, surety on the second bond, demurred to said bill on the ground that the bill failed to show that the principal, Matthews, signed said bond; that said bond was multifarious, and that there was an improper joinder of parties respondent. He also moved to dismiss said bill for want of equity. The court overruled said demurrers and motion.

The said Blackmon, Sanders and Harper, demurred to said bill on the grounds that said bill was multifarious; that there was improper joinder of party respondents; that the bill showed that they had been discharged by the taking and making of a new bond; and that said cause against them was barred by the statute of limitations. They also moved to dismiss said bill for want of equity. The court also overruled these demurrers and motion. The respondents above named then filed answers setting up substantially the same points as raised by demurrer and that the probate court had discharged the said Matthews, their principal from further liability, and that the chancery court had no jurisdiction to bring the said guardian to a settlement.

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The facts shown by the evidence in the case are substantially as averred in the bill.

Upon the final hearing on the pleadings and proof, a decree was rendered, granting the relief prayed for in the bill. Defendants appeal and assign as error said final decree and the rulings upon said demurrers and motions.

SOLLIE & KIRKLAND, for appellant.—Surety is a promise to answer for the debt, default or miscarriage of another.—*State v. Parker*, 72 Ala. 181.

For the obligee to accept a bond and approve it where the principal has not signed it, he thereby permits a fraud on the surety and they are not bound.—*Board of Education v. Sweeney*, 48 N. W. Rep. 302; *Penn v. Hamilton*, 27 Grat. Va. Rep. 337; *Ward v. Churn*, 18 Grat. Va. Rep. 802; 8 Am. Dec. 749; *Hall v. Parker*, 37 Mich. 590; *State Bank v. Evans*, 15 N. J. L. 155; *People v. Stacy*, 74 Cal. 273; *Oldham v. Brown*, 28 Ohio 41.

There must be an order of the probate court discharging the old bondsmen before they are relieved of liability.—*Hamner v. Mason*, 24 Ala. 480; *Jones v. Ritter's Admr.*, 56 Ala. 280.

The money having been converted to the guardian's own use before this appellant signed the bond. Appellant not liable.—*Henderson v. Henderson*, 58 Ala. 582; *May v. Duke*, 61 Ala. 63.

WORTHY, GARDENER & J. E. ACHER, for other appellants.—Wards must make an election of which sets of sureties they should proceed against.—*Lee v. Lee*, 67 Ala. 406; *Field v. Graves*, 68 Ala. 17. Where a new bond is given and the old bond having been relieved, the new bond is liable for misappropriation of the wards, funds before it was given.—*Foster v. Wise*, 46 Ohio St. 20; *Pinkerstaff v. People*, 59 Ill. 148; *Bobo v. Vaiden*, 20 S. C. 271; *Morris v. Morris*, 9 Hik. 814; *Schofield v. Churchhill*, 77 N. Y. 565; *State v. Burning*, 74 Mo. 87; *Phillips v. Brazel*, 14 Ala. 746; see also *Russell v. McDougall*, 3 S. Marsh Rep. 234; *Governor v. Robbins*, 7 Ala. 49;

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Steal v. Graves, 68 Ala. 17; *Lovell v. Hutchinson*, 106 Ala. 417.

FOSTER, SAMFORD & CARROLL, *contra*.—Wards have a right to bring their guardian and their sureties on his bond to a settlement in the chancery court.—*Haley v. Boyd*, 64 Ala. 401. A settlement of a guardian is void when made before he resigns or is removed.—*Glass v. Glass*, 76 Ala. 371; *Glass v. Glass*, 80 Ala. 242; *Lee v. Lee*, 67 Ala. 418; *Lewis v. Lewis*, 57 Ala. 630. It is both proper and important that the sureties on the two bonds should be brought in together in one suit.—*Self v. Blount Co.*, 27 South. 554; *Dallas County v. Timberlake*, 54 Ala. 403.

The second bondsmen of a guardian are liable for funds of the ward converted to the guardian's own use before the taking and approval of the second bond.—*Whitworth v. Oliver*, 39 Ala. 293; *Motawell v. Hudson*, 80 Ala. 268.

ANDERSON, J.—The complainants, minors, filed their bill by next friend, against their guardian and two sets of sureties on his official bonds for the purpose of bringing the said guardian, to a settlement.

The jurisdiction of the probate court and the court of chancery are concurrent in matters of guardianship, and the ward has an unqualified right of electing the forum in which he will seek a settlement.—*Haley v. Boyd*, 64 Ala. 399. And a final settlement made in the probate court by the guardian before his resignation or removal and during the minority of his ward, is void for want of jurisdiction of the probate court.—*Glass v. Glass*, 80 Ala. 241; *Glass v. Glass*, 76 Ala. 368; *Lewis v. Alfred*, 57 Ala. 628; *Lee v. Lee*, 67 Ala. 406.

A bill by a ward against the guardian and several sets of sureties on his official bonds, is not liable to objection on ground of misjoinder, multifariousness and want of equity, and the demurrers were properly overruled by the chancellor.—*Dallas County v. Timberlake*, 54 Ala. 403.

When one of the sureties filed his application, under the statute, for release from the old bond, the guardian

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was ordered to make a new bond and it appears that the new one was signed by Painter, et al., but that it was never executed by the principal, Matthews. If the bond was not executed by the principal, which fact is undisputed, it is not a statutory bond and did not authorize the issuance of execution under the statute. The bond, however, is good under § 2282 of the Code of 1896 as a common law liability.—*Painter v. Mauldin*, 119 Ala. 88.

The sureties on the old bond are liable for any *decras-tavit* prior to their release, and which could not have been sooner than the approval of the new bond, as to any of them.—§ 2280, Code, 1896. The uncontroverted evidence established the fact, that the conversion of the trust fund was long before the execution, by the sureties of the new bond. Matthews testified that he used \$100.00 of the fund as soon as he got it to pay a debt that he owed and deposited the balance with the "Dowling Company" to his individual credit; that it is not now on deposit and that he never used any of the money for the use of his wards. This was clearly a conversion and fastened the liability on the sureties on the old bond. *Henderson v. Henderson*, 58 Ala. 582; *DeJarnett v. DeJarnett*, 41 Ala. 708; *McLeroy v. Thompson*, 42 Ala. 656.

The misappropriation having taken place, long before the making of the new bond, the next question presented for our consideration is; are the sureties on the new bond liable? The authorities upon this subject are not entirely harmonious. The prevailing rule, however, and the one to which we adhere, holds them liable, upon the ground of the guardian's obligation to make true account.—15 Am. & Eng. Ency. Law, p. 119 and cases cited in note 4; *Whitworth v. Oliver*, 39 Ala. 293; *Moudrell v. Hudson*, 80 Ala. 268; *Lee v. Lee*, 67 Ala. 406.

The decree of the chancellor is affirmed.

MCCLELLAN, C. J., TYSON, and SIMPSON, J.J., concurring.

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Schwarz, Rosenbaum & Co. *et al.* v. Barley *et al.*

Bill in Equity to set aside Fraudulent Conveyances.

1. *Appeal; when taken from decree dismissing bill.*—Where a cause in a chancery court is submitted for a decree upon a motion to dismiss for the want of equity, and upon demurrers, and the chancellor renders a decree sustaining the motion to dismiss the bill for the want of equity, and orders that the bill be dismissed out of court, such decree is a final decree, from which an appeal may be prosecuted any time within a year from its rendition.
2. *Fraudulent conveyances; sale of property by partnership.* Where upon the dissolution of a partnership, it is stipulated in the agreement providing therefor that one of the parties should take the partnership property and pay the partnership debts, and after delivery of the partnership property to him, said partner, so assuming the debt, makes a fraudulent sale of said property, such property, in the hands of the fraudulent vendee, is liable to the payment of the partnership debts, and can be subjected thereto by creditors of the partnership.

APPEAL from the Chancery Court of Marengo.

Tried before the Hon. THOMAS H. SMITH.

The bill in this case was filed by the appellants as creditors of the firm of Barley and Matkins, against the appellees, Eugene A. Barley and Lamar Matkins and Maggie Walston.

It was averred in the bill that the complainants were creditors of the firm of Barley and Matkins, which firm was composed of the defendants, Eugene A. Barley and Lamar Matkins; that subsequent to the complainants becoming creditors of said firm, there was a dissolution of the firm by mutual agreement between the parties, in which agreement it was agreed and understood between them that the said Lamar Matkins should assume and pay all indebtedness of said partnership; that Barley should retire from the firm, and that by virtue of said

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agreement of dissolution, the partnership debt should be assumed and paid by said Matkins; that a short time after said dissolution, the defendant, Matkins, in disregard of said agreement, and with the intent to hinder, delay and defraud the creditors of said firm, did execute to Mrs. Maggie Walston a bill of sale of all of the stock of goods, wares, merchandise, etc., which formerly belonged to said firm; said property amounting to \$895.79; that the consideration of said transfer was an alleged indebtedness which the said Matkins claimed to owe Mrs. Walston. It was then averred that said consideration as expressed in the bill of sale was simulated and fraudulent, and that said sale was fraudulent and void, and was made for the purpose of hindering delaying and defrauding the creditors of said partnership; and that as a term of said sale, the said Matkins reserved a benefit in that he was to take charge of and sell said goods, and retain a part of the purchase money thereof for his service.

It was further averred in the bill that since said sale to Mrs. Walston, she and the plaintiff, Matkins, had disposed of all or nearly all of the said goods. The prayer of the bill was that said sale from Matkins to Mrs. Walston be declared fraudulent, null and void, and that a personal judgment be rendered against Mrs. Walston for the amount of the property which had been sold and conveyed by her, and that the balance of the goods remaining unsold be subject to the payment of complainants' debt. The defendants moved to dismiss the bill for the want of equity, and upon the ground stated in varying averments that the property conveyed by Matkins to Mrs. Walston was the separate property of Matkins, and as it was shown not to exceed in value \$1,000. the complainants could not complain of said sale, because the said Matkins was entitled to claim the same as exempt to him.

The defendants also demurred to the bill upon the same ground. On the submission of the cause upon the motions to dismiss and the demurrers, the Chancellor rendered the following decree:

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"Now, on consideration thereof, I am of opinion that both the motion and demurrers should be sustained. It is therefore ordered, adjudged and decreed that said demurrers be and they hereby are sustained. It is further ordered, adjudged and decreed that the motion to dismiss the bill of complaint for want of equity, be and the same hereby is sustained, and the bill of complaint dismissed out of this court." This decree was rendered on June 16th, 1902. On July 21st, 1902, an appeal was taken and security for costs given. In this court the complainants assign as error the rendition of said decree, sustaining the demurrers, and the motion to dismiss.

J. M. MILLER, for appellant.—The bill contained equity and should not have been dismissed.—*Aiken v. Steiner & Lobman*, 98 Ala. 355. The bill should not be dismissed for want of equity when it can be amended so as to give it equity, and this bill could be amended by asserting the insolvency of the parties so as to bring it within the case of the 98 Alabama above referred to. *Aiken v. Steiner & Lobman*, 98 Ala. 355; *Kyle v. Mary Lee Coal & Railway Co. et al.*, 112 Ala. 606; 3rd Mayfield Digest 333. The bill should not have been dismissed in vacation without giving the appellants a chance to amend.—*Blackwell et als. v. Fitzgerald*, 130 Ala. 584.

CANTERBURY & GILDER, *contra*.—The appeal was not taken within 30 days as is required by law.—*Kitchen v. Moye*, 17 Ala. 143; *Allen v. Elliott*, 67 Ala. 432; *Ex parte James*, 125 Ala. 119; *Anniston Electric & Gas Co. v. Cooper*, 34 So. R. 931. The bill shows that the partnership property was in good faith conveyed into separate property. This was done in this case. The creditors cannot complain of the sale of Matkins to Walston, unless they had an equitable lien which they could enforce. The agreement was not in writing, and this suit is not by *Barley v. Matkin*, but creditors against him. There is no such trust created that will avail to the benefit of the creditors.—*Reese & Hylan v. Bradford, et al*, 13 Ala. 837; *Evan v. Winston*, 74 Ala. 349;

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Aiken v. Steiner & Lobman, 98 Ala. 355. The partnership property having been converted into separate property, the defendant Matkin may claim his exemptions.—*Aiken v. Steiner & Lobman*, 98 Ala. 355; *Brinson v. Edwards*, 94 Ala. 447.

McCLELLAN, C. J.—The right of appeal exercised in this case is that given by section 426 of the Code, and not that given by section 427. The decree dismissing the bill was no less a final decree for that it was rendered on and in response to a motion to dismiss it for the want of equity. There has been a practice in this state to grant motions to dismiss *with leave to amend*. Such decrees while they granted the motion to dismiss in a way, yet did not in reality dismiss the bill finally. They were in the nature of tentative or conditional decrees and not final. To such decrees must be referred the provision of section 427 to the effect that from a decree sustaining a motion to dismiss a bill for want of equity an appeal may be taken within thirty days. That limitation does not apply where the motion is not only sustained but the bill is actually and absolutely dismissed out of court. The decree here is of this latter class, and was appealable any time within a year from its rendition.

We take occasion to repeat here what we have said in some recent cases that the practice referred to of thus conditionally dismissing bills on motion, and in recognition of which the provision of § 427 stated above was enacted, was a bad practice, and illogical, and should not be further resorted to.

On the allegations of the bill the complainants had no claim on the stock of goods growing out of the facts that originally it had been the property of the partnership composed of Barley & Matkin and that this firm owed the debts which complainants seek to recover by subjecting these goods or their proceeds, for, by a *bona fide* and valid agreement by which the partnership had been settled and dissolved, the stock of goods became the individual property of Matkin. But the complain-

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ants were creditors of Matkin individually as well as of the firm of Barley & Matkin, and they had the same rights in respect of this stock of goods in Matkin's hands as if it had all along been his individual property, and he alone owed these debts. Unless this property was exempt to Matkin, these complainants had a right to pursue it by this bill into the hands of a fraudulent purchaser and subject it or its proceeds to the payment of their claims. The allegations of the bill show that Matkin made a transfer of the goods to Mrs. Walston with intent to hinder or delay or defraud his creditors, that she participated in this intent, that the consideration paid by her was simulated or inadequate, that Matkin reserved a benefit to himself in the transaction, to wit, employment in the sale of the goods and a share of their proceeds, and that the goods have been disposed of by Mrs. Walston and she and Matkin now have the proceeds, etc. Of course, if this stock of goods was all the property owned by Matkin and its value, as the bill alleges, was less than one thousand dollars, the complainants were not hindered or delayed or defrauded by this transaction since they could not have subjected the goods had they remained in the hands of their debtor, being secured to him by the exemption statute. But the bill does not show that this was all the property Matkin owned, or, even that he was insolvent: So it cannot be said that bill shows complainants have not been injured by this alleged fraudulent transaction. For aught that appears Matkin may have had other property, which with this, amounted to twice the exemption allowed him, and he may claim that other property and not this as exempt, indeed he may have already filed his claim of exemption embracing such other property and not this. Hence our conclusion that this bill has equity to reach this property or its proceeds as Matkin's individual property to the debts which he owes individually to the complainants, and that of consequence the motion to dismiss should have been denied.

The assignments of demurrer also proceed upon the assumption that the bill shows that this stock of goods

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was exempt property. As it does not, the demurrer should also have been overruled.

The decree below must be reversed and a decree will be here entered overruling the demurrer and the motion to dismiss the bill.

Reversed and rendered.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Gillett *et al.* v. Higgins.

Bill in Equity for Settlement and Dissolution of Partnership, and for Appointment of Receiver.

1. *Dissolution of partnership; equity of bill in chancery.*—Where one of the members of a partnership has been excluded from the business of his firm, and the stock of goods owned by the firm has been taken into the possession of the other member of the partnership in collusion with a third party, the partner so excluded can maintain a bill for the dissolution of the partnership.
2. *Dissolution of partnership; appointment of receiver.*—Where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled a decree for dissolution, it is proper to appoint a receiver of the partnership's assets in business.
3. *Same; same.*—Where a bill is filed for the settlement and dissolution of a partnership, and the complainant also asks for the appointment of a receiver, and it is averred that the defendant partner sold out the firm's goods, and turned over the business to strangers, to the utter exclusion of the complainant, and in utter disregard of his rights and interests, there is made out a *prima facie* case for the appointment of a receiver even without notice of the application.
4. *Appeal does not lie from refusal of court to vacate an order appointing a receiver.*—An appeal does not lie from the refusal of the court to vacate an order appointing a receiver; such order being merely interlocutory, and not being one from which under the statute an appeal can be taken.

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APPEAL from the City Court of Bessemer in Equity.

Heard before the Hon. B. C. JONES.

The bill in this case is distinctively one for the dissolution and settlement of a copartnership between the complainant, M. M. Higgins and the defendant, George A. Gillett.

It is averred that on or about the 1st day of August, 1904, that said George A. Gillett and complainant entered into a partnership known as the Bessemer Paint & Wall Paper Company, and that they were each one-half owners of the business and stock of goods, worth between seven hundred and a thousand dollars, and that they operated said business until on or about the 25th of August, 1904, at which time complainant was ejected and forced out of the partnership store under threats of violence, accompanied with weapons, by defendants Malcolm and Will Chandler, who claimed that they had purchased the goods and business the day before from defendant, G. A. Gillett, who assisted said Chandlers in the ejection of complainant, thereby keeping him out of his place of business, and said stock of goods and business out of his possession, depriving him of any interest therein.

It is further alleged that said Chandlers with the assistance of said Gillett have taken charge of said store and business, under the name of Chandler Brothers, and have bought another stock of goods and mixed and mingled them with the stock of goods of complainants firm; that the said Gillett is staying in the store assisting in carrying on the business, and refuses to render any accounting of the said business or stock, or of the accounts owing the firm, and refuses to surrender any funds or goods to complainant or to account to complainant for the same, and he believes that defendants are in collusion with each other in depriving complainant of his business and any interest in said partnership.

It is further charged that said firm of which plaintiff was a member, kept a set of books, showing the debits and credits of the firm, and defendants refuse to allow complainant the possession or inspection of said books; that said business was profitable and was conducted on

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a paying basis, and by reason of his ejection therefrom, he has been greatly damaged.

The prayer of the bill was for the dissolution of said firm by a proper decree of the court; that defendants be required to produce and file with the register of the court all papers and books pertaining to the business of said firm; that they be required to make a full list of the stock on hand at the time said Chandlers claim to have bought out said business; to show what moneys have been collected on accounts due said firm; that the defendants be brought to an accounting between the complainant and said Gillett, etc., etc.

By a supplemental bill filed on the 7th of September, 1904, the complaint charged that defendants were daily disposing of said stock of goods, and if allowed to proceed, the entire stock will soon be disposed of, and irreparable injury will be inflicted on complainant unless said stock of goods is taken into the custody of the court. It is also charged that defendants are each worth less than their statutory exemptions under the laws of this State, and prayed for the appointment of a receiver to take possession of said partnership property, to make an accounting of all things pertaining to said partnership and wind up its affairs under the directions of the court.

The defendants in answer do not deny that the copartnership between complainant and said Gillett existed as alleged in the bill. They allege that about the 22nd of August, 1904, they bought and took possession of said stock of goods, though they do not allege from whom, and ran the business since that time; that since then they removed a stock of wall paper, etc., to the place of business of said Bessemer Paint & Wall Paper Company, worth about \$800.00, and had bought and added other goods to about \$750.00, and the value of the whole stock was worth about \$1,500.00; that all the stock they purchased from said Wall Paper Company, and all they added thereto, including horse and wagon, had been seized by the receiver, which will work irreparable injury to the defendants.

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It appears that the court appointed a receiver as prayed for, first requiring the plaintiff to execute a bond in the sum of \$500.00, payable to defendants, conditioned to pay them any damage which any person may sustain by the appointment of a receiver, if said appointment should be vacated. The receiver was also required to execute a bond properly conditioned payable to the register of the court, which bond was duly executed and approved.

The defendants moved the court on the 12th day of September, 1904, for reasons set out in their motion, to vacate and annul the appointment of the receiver, which was set down to be heard on the 15th of the month and which on the hearing was overruled.

The defendants appeal, and assign as error the decree of the court appointing the receiver, and the decree of the court refusing and overruling the motion to vacate and annul the appointment of the receiver.

J. A. ESTES, for appellant.—Section 799 of the Code provides for the appointment of a receiver upon application in writing, and this application we insist should be made independent of the bill, and there was no application made in the case at bar. The appointment of the receiver was made in this case without notice to the respondents, and that too without any emergency or necessity therefor being shown.

PINKNEY SCOTT, *contra*.—The original bill and the supplement thereto, together with the affidavits in this case show that the complainant was entitled to a dissolution of the partnership and to an accounting between himself and Gillett.—*Moore v. Price*, 116 Ala. 247.

Wherever a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled to a decree for dissolution, a receiver will be appointed of course. The reason being that the same causes which would justify a decree for dissolution generally justify the appointment of a receiver.—*Bard v. Gingham*, 54 Ala. 466.

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There can be no question in this, but that this cause would fall within the rule and the circumstances clearly bear it out, that notice necessary to the defendants, praying for the appointment of a receiver and the affidavit attached to the supplemental bill go to show that these defendants were insolvent and they were disposing of the property belonging to the Bessemer Paint & Wall Paper Company at the time the supplemental bill was filed and in all cases, such circumstances dispense with the notice.—*Irwin v. Everson*, 95 Ala. 64; *Ashurst v. Iehman, Durr & Co.*, 86 Ala. 370; *Word v. Word*, 90 Ala. 84; *Heard v. Murray, Dibbrell & Co.*, 93 Ala. 127; *Butts v. Broughton*, 72 Ala. 295; *Hendrix v. Amr. Freehold Land Mort. Co.*, 95 Ala. 314.

HARALSON, J.—The action taken by the defendants in excluding the complainant from the business of his firm, as set up in the bill, presented a sufficient cause for the dissolution of the partnership by the court of equity on the application of the complaint.—*Moore v. Price*, 116 Ala. 247; *Meaher v. Cox*, 37 Ala. 201; 17 Am. & Eng. Ency. Law, (1st Ed.) 1106-7.

While the taking into the custody of the court the partnership effects, was a stringent measure, not to be resorted to except remedially, yet it rests largely within the discretion of the court; and the authorities affirm, as a general rule, "that when a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled to a decree for dissolution, a receiver will be appointed of course."—*Bard v. Bingham*, 54 Ala. 463; *Briarfield Iron Works v. Foster*, *Ib.* 622; *Bank v. U. S. S. & L. Association*, 104 Ala. 297.

The steps taken by complainant's partner, Gillett, in selling out the firm's goods and turning over the business to strangers in the manner averred were radical and extraordinary, and in utter disregard of complainant's rights and interests, making a *prima facie* case for the appointment of a receiver, even without notice of the application.—*Hendrix v. A. F. L. M. Co.*, 95 Ala.

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316; *Ashurst v. Lehman Durr & Company*, 86 Ala. 370. Here the matter of the appointment of the receiver, was brought forward by supplemental bill, the receiver was appointed on the 8th of September, and qualified by executing the bond prescribed on the 9th, a motion was made to discharge him on the 12th, which was set for hearing on the 15th of September and overruled.

We have not been shown nor have we ascertained wherein the court erred in the appointment of the receiver.

No appeal lies from the refusal of the court to vacate an order appointing a receiver, such an order being merely interlocutory.—*Miller v. Lehman, Durr & Co.*, 87 Ala. 519.

Affirmed.

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

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Action for Alleged Breach of Verbal Contract.

1. *Assignment of choses in action; suit may be brought in name of assignee.* The equitable title of an assignee to chose in action will be recognized by courts of law, and suit may be brought in the name of the assignor.
2. *Assignment of verbal contract; if not for payment of money, need not be prosecuted in name of party really interested; Sec. 28 Code.*—When an assigned contract or agreement to sell an amount of cotton at a stipulated price, the breach of which is relied upon for a recovery, is not for the payment of money, either express or implied, it is not governed by section 28 of the Code, which requires the action, where such is the case, to be prosecuted in the name of the party really interested.
3. *Same; when contract not within provisions of Sec. 876 Code.*
An assigned verbal contract for the sale of cotton at 7¼

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cents per pound is not within the provisions of Section 876 of the Code, which authorizes the endorsee to maintain an action upon all bonds, contracts and writings for the payment of money or other thing or the performance of any act or duty, assigned to him by endorsement.

APPEAL from Marshall Circuit Court.

Tried before the Hon. J. A. BILBRO.

This action was brought by appellee, Robert N. Bell, as trustee for the benefit of Knight, Henry & Co., a domestic corporation against appellant John H. Snead. With the exception of those counts of the complaint which were withdrawn by the complainant, demurrers of defendant were sustained to all the counts except the 10th and 11th, which are as follows: "10. The plaintiff as assignee of Knight, Henry & Co., a cotton company corporation for the benefit of the creditors of said Knight Henry & Co., claims of the defendant the sum of two thousand dollars for this; that on or about the — day of April, 1901, the defendant entered into an agreement or contract with the said Knight, Henry & Co., whereby he agreed to sell and deliver to said Knight, Henry & Co., at Boaz, Ala., six hundred and fifty bales of cotton at the agreed price of 7 3-4 cents per pound in consideration of the said Knight, Henry & Co., agreeing to buy said cotton at said price, said cotton to be delivered within a reasonable time, all on demand of said Knight, Henry & Co. That the said Knight, Henry & Co., being then and there able, willing, and ready to perform its part of said contract on or about the 2nd day of April, 1901, demanded said cotton of said defendant at Boaz, Ala. But the said defendant failed and refused to deliver said cotton to said Knight, Henry & Co., to the great damage of said Knight, Henry & Co., which said right of action is now the property of said Robert N. Bell, as assignee of said Knight, Henry & Co."

11. "The plaintiff claims of the defendant two thousand dollars for; That on or about the 1st day of April, 1901, Knight, Henry & Co., agreed to buy of the defendant six hundred and fifty

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bales of cotton, at and for 7 3-4 cents per pound and to accept and pay for the same when the said cotton was properly classed and weighed by their classer and weigher. That the said defendant agreed to sell and deliver said 650 bales of cotton to said Knight, Henry & Co., at Boaz, Ala., at and for 7 3-4 cents per pound to be classed and weighed by the weigher and classer of said Knight, Henry & Co. That on or about the 2nd day of April, when the said Knight, Henry & Co., were to have the said cotton weighed and classed by their weigher and classer and ready, willing and able to pay for the same, said defendant notified said Knight, Henry & Co. that he would not sell and deliver it, the said 650 bales of cotton, and failed and refused to sell and deliver said 650 bales of cotton, to Knight, Henry & Co., to the great damage of said Knight, Henry & Co., which said cause of action, is now the property of this plaintiff as such assignee of Knight, Henry & Co., for the benefit of the creditors of said Knight, Henry & Co." To these counts, appellant demurred on the following grounds: "To counts 10 and 11, inclusive: 1. To each of said counts, defendant re-assigns each ground of demurrer separately that was assigned to counts 1, 2 and 3 of the original complaint. (These grounds of demurrer to counts 1, 2 and 3, were: 1. Because it is not shown by what right plaintiff sues as trustee or assignee; because this suit on the allegations of each count can be maintained only by Knight, Henry & Co.; because the creditors of Knight Henry & Co. are not proper beneficial plaintiffs and are insufficiently described; because the names of the creditors of Knight, Henry & Co. are not set out; 4. Because there is a misjoinder of parties plaintiff in this suit in this, a nominal plaintiff is introduced without any averment showing a necessity therefor; because there is a misjoinder of parties plaintiff in this: 'Knight, Henry & Co.' is improperly joined with their creditors as beneficial plaintiffs.) 2. Because said count avers that if the delivery was not made within a reasonable time it was to be made on demand. 3. Because the averment of the time of delivery is in the alternative and is uncertain and indefinite. 4. Because no contract to deliver at

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Boaz is averred." The Court overruled these demurrers and the defendant excepted and assigns such ruling as error. The defendant then filed the following pleas: 1. The defendant denies each and all the allegations of the complaint. 2. The defendant says that R. N. Bell, as assignee or trustee as alleged is not the beneficial owner of the demand sued on. 3. The defendant further says that the plaintiff R. N. Bell is not the owner of the demand sued on. 4. The defendant further says that he is not indebted in manner and form as alleged in the complaint." The plaintiff moved to strike the 2nd and 3rd pleas, which motion was sustained. The defendant excepted and assigns the ruling of the court in striking such pleas as error. Issue was joined on the 1st and 4th pleas.

On the trial of the case, the plaintiff introduced evidence showing that the freight rate from Boaz to Savannah, Ga. on flat or uncompressed cotton (the cotton in controversy was flat or uncompressed) was 54 cents per 100 pounds; on compressed cotton it was 45 1-2 cents per 100 pounds, and that the rates of freight from Gunterville to Savannah were the same as from Boaz to Savannah. To the introduction of this evidence the defendant objected on the ground that same was illegal, irrelevant and immaterial. The Court overruled the objections, and the defendant excepted, and assigns the ruling of the court on such objections as error. The defendant testified that he did not offer to sell the cotton to Knight, Henry & Co. at 7 3-4 cents; that at the time he was talking to their Mr. Henry over the telephone, he had three telegrams in his hand and that he went direct to the telegraph office from the telephone office, and sent the telegrams. Defendant then offered in evidence three of said telegrams, one being to Garden, Neeley & Co., one to Johnson Nesbit & Co., and one to Howell Cotton Co., all in substance as follows, dated April 1, 1901, and reading "Make me round offer on six hundred and fifty bales cotton. (Signed) J. H. Snead." The plaintiff objected to said telegrams. The Court sustained the objections and to the exclusion of each of said telegrams the defendant

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then and there duly excepted and assigns same as error.

The Court, at the request of the plaintiff, gave the following charge: "If the jury reasonably believe from the evidence an option to Knight, Henry & Co. in their own right and for themselves was given on the cotton, this was not employing Knight Henry & Co. to sell cotton for Snead. If defendant gave Knight, Henry & Co. such an option on the cotton, this would not make the duty of Knight, Henry & Co. to inform Snead of the sale made by them or its terms." To the giving of this charge the defendant then and there duly excepted and assigns same as error. The defendant requested the court to give the following written charges: "A. If the jury believe the evidence, they must find for the defendant. B. The Court charges the jury that by the first conversation over the telephone between Snead and Henry there was no agreement to sell the cotton to Knight, Henry & Co., but it constituted only an employment of Knight, Henry & Co. to sell Snead's cotton for him. C. The Court charges the jury that the first conversation over the telephone between Snead and Henry did not constitute an agreement on the part of Snead to sell his cotton to Knight, Henry & Co. D. The Court charges the jury that if Snead employed Knight, Henry & Co. to sell his cotton for him at 7 3-4 cents per pound, then all profits made by Knight, Henry & Co. over and above that amount, on a sale of the cotton belonged to Snead and not to Knight, Henry & Co." The court refused to give each of said charges, and to the refusal of each, the defendant then and there duly excepted, and assigns the same separately, as error.

There were verdict and judgment for the plaintiff for \$942.50. The defendant made a motion for a new trial on the following grounds: 1. That the Court erred in giving the written charge requested by the plaintiff; 2. That the court erred in refusing each of the written charges requested by the defendant; 3. That the verdict was contrary to the evidence; 4. That the verdict of the jury was excessive in the damages allowed. The court overruled said motion and the defendant excepted and assigns same as error. From the judgment in the case, the defendant appeals and assigns the rulings of the

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court upon the pleadings and evidence, as set out above, as error.

STREET & ISBELL, for appellant.—Assignee for the benefit of creditors cannot sue in his own name on the contract set out in said counts. Code, Sec. 28; *Auerbach v. Pritchett*, 58 Ala. 451. Pleas 2 and 3 were stricken from record because not sworn to. This was manifest error. The verbal contracts whose assignment must be denied by sworn pleas, are those for the payment of money. *Buck v. Carlisle*, 98 Ala. 580; *Auerbach v. Pritchett*, *supra*; *Babcock v. Carter*, 117 Ala. 575; Code, Sec. 28, and citations. The affirmative charge should have been given for the defendant.—*Henderson v. Vincent*, 84 Ala. 99; *McGar v. Adams*, 65 Ala. 106; 12 Am. & Eng. En. Law, 2 Ed. 643-4; 4 Am. & Eng. En. Law, 2 Ed. 977. There was a fatal variance between the allegations and the proof. The evidence as to freight rates was irrelevant. The telegrams excluded were part of the *res gestae*. *Wilson v. Klein*, 90 Ala. 518. New trial should have been granted: evidence tending to show a sale to plaintiff was very, very shadowy.—*A. G. S. v. Powers*, 73 Ala. 244; 14 En. Plead & Prac. 776. The jury must have misunderstood, or misconceived the force and effect of, the evidence.—*Cobb v. Malone*, 92 Ala. 630. Verdict was excessive; plaintiff testified that cotton was 1-8 cent higher when defendant refused to deliver than it was when first conversation was had. According to this, the damage with interest was only \$481.40.

J. A. LUSK, *contra*.—Demurrers were properly overruled.—86 Ala. 152; 116 Ala. 393; *McFadden v. Henderson*, 126 Ala. 221. The measure of damages is the difference between the agreed price and the market price at the time the cotton should have been delivered.—*Haralson v. Stein*, 50 Ala. 347; *Penn v. Smith*, 104 Ala. 449; 93 Ala. 476; *Young v. Curuton*, 87 Ala. 729; *Bell v. Reynolds*, 78 Ala. 511; *Buist v. Guice*, 96 Ala. 255. The seller cannot absolve himself from liability by reason of non-delivery by showing that the buyer was not ready to

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pay for the goods if the seller is unable to deliver.—*Berry v. Bell*, 54 Ala. 446.

TYSON, J.—The 10th and 11th counts of the complaint, added by way of amendment, and upon which a recovery was had, shows that the recovery sought is by Bell, the plaintiff, as assignee of Knight, Henry & Company, a corporation, for the benefit of the creditors of that corporation, for the breach of a verbal agreement or contract for the sale of certain cotton by defendant to Knight, Henry & Company. One proposition raised by the demurrer to these counts is that Bell as assignee cannot sue in his own name on the contract alleged.

At common law choses in action with the exception of negotiable instruments, were held not to be assignable, unless the debtor assented to the assignment and promised to pay the assignee, in which case the assignee might maintain an action against the debtor on the express promise to pay.—*Goodwyn v. Lloyd*, 8 Porter, 240, *Brickell's Digest*, § 3 p. 124.

And in the early period of the administration of the common law, equitable titles acquired by assignment of non-negotiable choses in action were not recognized by courts of law and the remedy of the assignee was in equity. However, later, courts of law began to recognize the equitable rights of the assignee and, at the present time, though the assignee be afforded no aid by legislation, these courts will recognize the assignment and permit the assignee to enforce his rights by suing in the name of the assignor.—*Black v. Everett*, 5 S. & P. 60; *P. & M. Ins. Co. v. Tunstall*, 72 Ala. 148; 1 *Brick. Dig.* § § 56, 57, p. 127; 2 *Brick. Dig.* § 129, p. 338; 7 *Ency. Pl. & Pr.* pp. 732, 733.

The contract or agreement, the breach of which is relied upon for a recovery, is not for the payment of money either express or implied, and, therefore, not governed by section 28 of the Code of 1896 which requires the action, where such is the case, to be prosecuted in the name of the party really interested. Nor is it within the provisions of section 876 of the Code which authorizes the endorsee to maintain an action upon all bonds,

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contracts and writings for the payment of money or other thing or the performance of any act or duty, assigned to him by endorsement.

The demurrer to the counts should have been sustained.—*Phillips v. Sellers*, 42 Ala. 658.

Reversed and remanded.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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Action of Assumpsit to recover Money deposited in Bank.

1. *Deposit of money in bank by husband in name of wife; when cannot be drawn out by wife.*—Where a husband deposits money in a bank in the name of his wife, receiving a book showing that an account was opened in the name of the wife, and that she was credited with the amount of the deposit, and at the same time he delivered to the bank a signature card which contained the direction in the name of the wife, that in the payment of funds and other transactions the signature to be recognized by the bank was the name of the wife per the husband making the deposit, upon the death of said husband, the wife cannot draw out the money remaining on deposit on check bearing her signature, nor can she recover such money in a suit against the bank.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This action was brought by the appellee, Mrs. D. E. Taylor, against the First National Bank. The purpose of the suit and the facts of the same are sufficiently stated in the opinion. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence, the court rendered judgment in favor of the plaintiff. The defendant appeals and assigns as error the rendition of such judgment.

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HORACE STRINGFELLOW, for appellant.—The facts show that C. E. Taylor was alone known to the bank. There is no evidence that Mrs. D. E. Taylor was present at the time the deposit was made, or that she ever had any dealings with the bank in reference thereto. C. E. Taylor made the deposit and at the time the deposit was made, the appellant by virtue of the signature card which he gave at the time of the deposit defining how the deposit could be withdrawn, contracted with him to pay out money only upon checks signed by him in the manner stated.—*Davis v. Lenawee County Savings Bank*, 53 Mich. 163; *Savings Bank of Baltimore v. McCarthy*, 89 Md. 194; *Taylor v. Henry*, 58 Md. 557; *Gorman v. Gorman*, 87 Md. 348; *Branch v. Dawson*, 36 Minn. 193; *Davis v. Bank*, 53 Mich. 163; *Weitzel v. National Bank*, 18 Penn. Sup. Court Rep. 615.

It was necessary to appellee's right to recover that she should either show that it was her money or that the deposit was made for her benefit. The only evidence the appellant had that the money belonged to the depositor, C. E. Taylor, was that it was in his possession, that it received the money from him. This possession creates presumption of ownership.—*German Bank v. Hemstedt*, 42 Ark. 62; *Berney v. Steiner Bros.*, 108 Ala. 116; *Lakeside Land Co. v. Dronngrool*, 89 Ala. 506; First Greenleaf on Evidence, Section 34.

Nor can it be said that the deposit by C. E. Taylor in the name of Mrs. D. E. Taylor constituted a gift to her for the reason that at the time the deposit was made the depositor reserved and exercised control over the deposit. *Green v. Bank of Camas Prairie*, 64 Pacific 888; *Branch v. Dawson*, 36 Minn. 193; *Robertson v. Ring, Admr*, 72 Me. 140; *Davis v. Lenawee County Savings Bank*, 53 Mich 163; *Brodurick v. Walthores' Savings Bank*, 109 Mass. 149; *Douglass v. First National Bank*, 17 Minn. 35; *McCluskey v. Provident Institution for Savings*, 103 Mass. 300; *Dodge v. Lunt*, 181 Mass. 320.

What is required is that there should be a clear surrender of the right and of the dominion in contradistinction of a promise to surrender. If there be a reservation of the use and enjoyment this is not a valid executed

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gift inter vivos.—*Walker, Guardian v. Crews*, 73 Ala. 417; *Brantley v. Cameron*, 78 Ala. 72; *Sayre v. Weil*, 94 Ala. 466; *Anniston National Bank v. Howell*, 116 Ala. 375.

JOHN W. OVERTON, FULLER & FULLER, and CHARLES P. JONES, *contra*.

SHARPE, J.—On June 17, 1903, Charles E. Taylor who was plaintiff's husband, deposited with the defendant, which is an incorporated National Bank, \$650.00 in the name of "Mrs. D. E. Taylor" and received from the Bank teller an account book having on its back the words and figures "First National Bank, Montgomery, Ala. In account with Mrs. D. E. Taylor," and having inside of it these words and figures, "Dr. ——— In account with Mrs. D. E. Taylor, Cr. June 17, 1903—\$650.00." At the same time Charles E. Taylor delivered to defendant a signature card, which has ever since been in defendant's possession, having on it the words and figures "Mrs. D. E. Taylor to the First National Bank of Montgomery. Below please find duly authorized signatures which you will recognize in payment of funds or the transaction of other business on our account. Mrs. D. E. Taylor per C. E. Taylor." On June 22, 1903, Charles E. Taylor drew two checks upon the deposit, one for \$4.00 and the other for \$5.00, to each of which checks he attached the signature "Mrs. D. E. Taylor per C. E. Taylor" and each of which checks were on that day paid by defendant. Charles E. Taylor died on or about June 22, 1903, and some days thereafter plaintiff drew a check on defendant for the balance of the fund signed "Mrs. D. E. Taylor" and defendant refused to pay it, and also refused to pay on a demand made by plaintiff's attorney.

On facts undisputed and substantially as above stated, without more, this cause was tried without a jury. The main question presented by the record is whether those facts show a liability on the part of defendant to the plaintiff rather than to the estate of Charles E. Taylor, deceased. In considering the question it is proper to be-

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gin by presuming that the money before and up to the time of its deposit, was the property of Charles E. Taylor. Possession of personal property is *prima facie* evidence of title in the possessor.

This presumption made, plaintiff's claim is left to rest upon the theory that a gift to her was effected by the transaction wherein the money was deposited. To the making of a gift it is essential that there be a delivery, actual or constructive, of the thing with intent on the part of the donor to divest himself of ownership, and this principle is applicable to deposits in banks made by one to the account of another.—*Anniston National Bank v. Howell*, 116 Ala. 375; *Matter of Bolin*, 136 N. Y. 177; *Robinson v. Ring, Admr.*, 72 Me. 140; *Broderick v. Waltham Sav. Bank*, 109 Mass. 149; *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163; *Greene v. Bank*, (Idaho) 64 Pac. Rep. 888; 14 Am. & Eng. Ency. Law, 1037, 1039.

The evidence in this case is not inconsistent with an intention on the part of Charles E. Taylor to make the deposit in plaintiff's name for his own purposes or convenience, and we think is insufficient to show a gift. The signature card amounted to a direction to the bank and negatived any right of the plaintiff to draw on the fund in question except on checks signed by Charles E. Taylor in her name, and such direction is inconsistent with an intention on his part to invest the plaintiff with that control over the fund which is necessarily incident to ownership. Such signing of checks on a fund belonging to plaintiff would apparently have been the act of her agent, but this consideration does not weigh in determining whether she became the owner.

The judgment must be reversed and one here rendered in favor of the defendant.

Reversed and rendered.

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King v. Henderson & Bruce.*Action on the Case.*

1. *Action on the case; when necessary to prove price at which property is sold.*—In an action on the case by a landlord to recover damages for the defendant preventing the enforcement of his lien by removing property subject thereto, where the plaintiff does not show at what price he sold said property, or that any part of the purchase money remains unpaid, but introduces evidence tending to show only the value of the property, plaintiff is not entitled to recover; the evidence so introduced having no tendency to prove plaintiff's loss.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. JOHN C. ANDERSON.

This was an action on the case brought by the appellees, Henderson & Bruce, against the appellant, John J. King, to recover damages for the defendant's taking possession of a mule from the tenant of the plaintiffs, and thereby preventing the plaintiffs from enforcing their lien on said mule, and collecting their debt. The complaint as originally filed contained a single count in trover; and a count stating an action of trespass on the case was filed by amendment. The court gave the general affirmative charge in favor of the defendant as to the count seeking to recover in trover.

It was shown by the evidence that the plaintiffs were the landlords of one Mose Parker for the year 1901, and during that time they advanced to said Parker the mule involved in this controversy for the purpose of enabling him to make a crop. The other facts of the case are sufficiently stated in the opinion.

The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe from the evidence that plaintiffs took a mortgage on said mule, they must find for the defendant on

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second count." (2.) The plaintiffs must show at what price they sold the mule to Mose Parker before they can recover in this case."

There were verdict and judgment for the plaintiffs. The defendant appeals and assigns as error the refusal of the court to give the charges requested by him.

WM. CUNNINGHAME, for appellant.—The court erred in refusing the general charge for the defendant upon the second count of the complaint.—Code of 1896, § § 2703, 2706; *McCarty v. Roswald & Co.*, 105 Ala. 511; *Ehrman v. Oats*, 101 Ala. 604; *Karter v. Fields*, 130 Ala. 430; *Davis & Son v. Hurt*, 114 Ala. 146; *Gerson & Son v. Norman*, 111 Ala. 433. The court erred in refusing the following charge: "The plaintiffs must show at what price they sold the mule to Mose Parker before they can recover in this case."—*Karter v. Fields*, 130 Ala. 430; *Waite v. Corbin*, 109 Ala. 154; *Clanton v. Eaton*, 92 Ala. 612; Code of 1896, § 2703.

CANTERBURY & GILDER, *contra*.—Cited *Kelly v. Eyster*, 102 Ala. 325; *Atkinson v. James*, 96 Ala. 214; *Manasses v. Dent*, 89 Ala. 565; *Lomax v. LeGrand*, 60 Ala. 537; *McCarty v. Roswald & Co.*, 105 Ala. 511; *Boutwell v. Parker*, 124 Ala. 341.

McCLELLAN, C. J.—The theory for plaintiffs is that they sold the mule in question to a tenant of theirs to enable him to make a crop on the rented lands, that the sale was on a credit, that to secure the payment of the purchase money they as landlords had a lien on the mule under section 2703 of the Code of 1896; that the defendant has prevented their enforcement of this lien by wrongfully intermeddling with and taking away the property, and that therefore their debt has been lost and they are to that extent damaged. But they do not show in this case what amount they sold the mule for, nor even that any part of the purchase money remains unpaid. Proof of the *value* of the mule is not proof of the price at which they sold it, nor that any part of the purchase price remains unpaid; but proof of value is all that

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is attempted to be made in the case that could have any possible reference to their loss; and this by itself has no tendency to prove their loss. They failed in short to prove that the act complained of has injured them at all; and the affirmative charge requested by the defendant should have been given.—*Karter v. Fields*, 130 Ala. 430.

Whether the same conclusion would result from other considerations we deem it unnecessary to decide.

Reversed and remanded.

HARALSON, DOWDELL and DENSON, J.J., concurring.

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Bill in Equity by Electric Light Company to Enjoin another Electric Light Company from Stringing its Wires along a Street of a City.

1. *Bill to enjoin stringing of wires along the street; condition of ordinance; does not change the rule as to necessity of averments of facts.*—Where an electric light company which is operated in a city, and has its wires strung upon poles along the streets of said city, files a bill to enjoin another light company from stringing its wires along a street which is occupied by the complainant, and it is averred that the defendant company held a franchise from said city for the purpose of furnishing electric light, power, etc., and that said franchise contained a special proviso which obligated the defendant to so erect its poles and wires as "not to interfere with the poles and wires of complainant," the existence of such proviso in the franchise granted to the defendant, does not change the rule of law that the complainant in seeking its injunction must by its bill show the necessity for the injunction prayed for by the statement of facts, and not by the mere statement that the complainant will be irreparably damaged.

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2. *Same; same; same.*—In such a case where the averments of the bill upon which the prayer for an injunction is based, are that complainant "is informed and believes, and upon such information and belief avers the facts to be that" the defendant intends to proceed and string its wires on poles already erected on said street, and make necessary connections therein, which "will interfere with the poles and wires of your orator, and irreparably damage your orator's wires and make it impossible for your orator to furnish lights," etc., according to contract, and that said defendant has connected its wires with one place of business along said street, and is furnishing light thereto, and that "it is dangerous to the life and property of the citizens of Montgomery for the defendant to be allowed to connect its wires," in the manner above stated, such averments are mere conclusions of the pleader, and are insufficient, in that they do not set out facts upon which issue can be joined, testimony taken and a decision had as to whether irreparable injury will be inflicted or danger incurred, etc.
3. *Electric light companies; no exclusive right in the streets of a city.*—It is not within the power of a municipal corporation to grant any exclusive privilege in its streets to another corporation, so as to deprive itself of the right to revoke the same and grant like privileges to another corporation.
4. *Same; same.*—Where a municipality has granted to a corporation the right to use its streets for a public utility, it has the right to grant like privileges to another corporation and to provide such restrictions and regulations as are necessary to prevent injury to the property of the first occupant and to prevent an interference with the discharge of its duties assumed to the public, and where such interference involves danger to the public, the courts will prevent it even without an ordinance upon bill properly filed.
5. *Municipal corporations; when resolution not of a permanent character.*—An ordinance passed by the city council of a municipality, granting permission to an electric light company to maintain for a period of twenty days its line of wire, as then strung along a certain designated street in said city, and to make all necessary connections therewith, and which provide that the same should not become effective unless officials of the company obligate themselves "at the expiration of twenty days to replace said wires in accordance with such ordinance and regulations of the city code as may then be in force," is not a resolution of a permanent character within the

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meaning of an ordinance of said city which requires the vote of the majority of the members of the city council to adopt a resolution or ordinance of permanent operation.

6. *Electric light companies; rights of competing companies to use all streets.*—Where an electric light company has by an ordinance of a city been granted the right to erect its poles and string its wire along the street of said city, it has no special rights in the streets of said city except as granted by the municipal authorities, and such company does not acquire rights over any distinct or separate part of the street, such as the right of way of a railroad company over which another company cannot pass without instituting condemnation proceedings, but the rights of the first electric light company who occupies the street of said company are subject to the rights of any other electric light company to which the city may grant the right to string its wires over the street, subject only to the right of the first company to be protected from injury by the stringing of other wires so near as to injure its property or prevent the discharge of its duties to the public.

APPEAL from the City Court of Montgomery in Equity.

Heard before the Hon. A. D. SAYRE.

The bill in this case was filed by the appellant, The Montgomery Light & Water Power Company, against the appellee, The Citizens Light, Heat & Power Co., and prayed for an injunction "restraining the Citizens Light, Heat & Power Co., its officers, agents and employees, from stringing its wires, or doing, or performing any other act contemplated by the resolution in said bill set forth, and upon a final hearing * * * * * to make said injunction perpetual."

The other facts of the case are sufficiently stated in the opinion. On the submission of the cause upon the motion to dismiss the amended bill for the want of equity upon the demurrer to the amended bill and upon the motion to dissolve the interlocutory injunction for the want of equity in the bill upon the sworn denials of the answer, and because the injunction was improvidently granted, the court rendered a decree overruling the motion to dismiss the amended bill, but sustained the demurrer to the

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bill as amended, and granted the motion to dissolve the interlocutory injunction. The complainant appeals and assigns as error that portion of the decree sustaining the demurrer to the bill as amended, and dissolving the interlocutory injunction.

R. E. STEINER, for appellant.—The following points constituted the chief equities in complainant's bill, as understood by complainant: First, That appellee's franchise was obtained from the City Council of Montgomery, upon the condition, (which condition is incorporated therein as a part thereof) and distinctly set forth in it, that the poles and wires of appellee should not be erected and strung so as to *interfere with the poles and wires of appellant*. On this proposition alone there was equity in complainant's bill; and the injunction should have been retained. Second. It was not incumbent upon appellants to set up the facts required to be set up by the learned Judge of the Court below, for the reason that appellee received its franchise upon the *condition* above referred to; and if in the exercise of that franchise, appellee was interfering with the poles and wires of appellant, then I submit most earnestly that the court of equity was open to appellant to enjoin any such action.

That injunction was the proper remedy.—See Smith on Municipal Incorporations, § 1623. Although there might be an adequate remedy at law, still injunction was the proper remedy.—See Smith, *Ibid*.

PHARES COLEMAN and CRUM & WEIL, *contra*.—The averments in neither the original nor amended bill, are sufficient to authorize the injunction. The injunction must stand or fall upon the insufficiency of the bill as originally filed, and cannot be propped up by subsequent amendments. Therefore, if by reason of the insufficiency of the averments of the original bill, the injunction was improvidently issued, it should be dissolved, notwithstanding equity may be injected into the bill by subsequent amendment.—*Calderwood v. Trent*, 9 Rob. (La.) 227; *Barnes v. Dickinson*, 1 Dev. (N. C.) 326; *Rennick*

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v. Wilson, 6 *Johnson* (N. Y.) 81; *Wayne v. Hockin*, *Dickins* 255; *Vare v. Glynn*, *Dickins*, 441; *Walsh v. Smyth*, 3 *Bland* (Md.) 9, 20; 10 *Ency. of Pl. & Pr.* 976 &c; *Lehman v. Greil*, 119 *Ala.* 262.

To authorize an injunction upon the ground of irreparable injury, the averments of the bill of irreparable damage must be supported by the averment of facts and proper charges. The averment of mere conclusions will not suffice; when the injury is uncertain, indefinite, contingent and speculative, injunction will not lie.—*Keller v. Bulington*, 101 *Ala.* 267; *Bolling v. Crook*, 104 *Ala.* 138; *Rouse v. Martin*, 75 *Ala.* 510; *Kingsbury v. Flowers*, 65 *Ala.* 486. Complainant can have no monopoly in a street. Everyone using a public street for any purpose, impairs to some extent the enjoyment of every other user. Such an impairment is an incidental injury for which there can be no judicial redress.—*Am. Tel. & Tel. Co. v. Morgan County Tel. Co.*, 138 *Ala.* 597; *Light Co. v. Light & Gas Co.*, 94 *Ala.* 374; *Tel. Co. v. Francis*, 19 *So. Rep.* 3.

Lawful acts, under authority, cannot be enjoined, no matter how damaging. Everything the defendant did in this case was done under authority, so far as the averments of the original amended bill show.—*Am. Tel. & Tel. Co. v. Morgan County Tel. Co.*, 138 *Ala.* 597; *Birmingham Trac. Co. v. So. Bell Tel. Co.*, 119 *Ala.* 144; *Cumberland Tel. & Tel. Co. v. U. S. Elec. Co.*, 12 *L. R. A.* 548.

Merely incidental injuries cannot be enjoined.—*Birmingham Trac. Co. v. So. Bell Tel. Co.*, 119 *Ala.* 144. The damages occasioned to the complainant are not the direct consequence of the construction of the defendant's line, but are incidental damages resulting from their operation, and therefore are not such as against which an injunction would lie.—*Am. Tel. & Tel. Co. v. Morgan County Tel. Co.*, 138 *Ala.* 597; *C. R. A. & Co. v. U. S. Ry. Co.*, 12 *L. R. A.* 551; 42 *Fed. Rep.* 273.

No injunction will be issued to prevent conjectural injuries.—*Kingsbury v. Flowers*, 65 *Ala.* 484; *Cumberland Tel. Co. v. Cook*, 53 *S. W.* 153; *Pa. R. R. Co. v. Wilming-*

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ton City R. Co., 38 Atl. Rep. 1070; *Printing Co. v. Howell*, 28 L. R. A. 476. Temporary interruptions will not be enjoined.—*Ft. Clark R. Co. v. Anderson*, 49 Am. Rep. 547; *Ridge v. R. R. Co.*, 43 Atl. Rep. 278.

Where a bill is filed seeking an injunction, and the averments of the bill, by reason of which the equitable relief is sought, are denied by a sworn answer, the injunction should be dissolved. The answer to the original bill and to the amended bill, expressly denied the material averments of the bill, and sets forth at length facts which substantiate such denial. It has been repeatedly decided by this court that an injunction must be dissolved upon the sworn denials of the answer.—*L. & N. R. R. Co. v. Bessemer*, 108 Ala. 238; *Hays v. Ahlrichs*, 115 Ala. 239, 249; *Hartley v. Matthews*, 96 Ala. 224; *L. & N. R. R. Co. v. Plutyan*, 94 Ala. 463; *Jackson v. Jackson*, 91 Ala. 292; *C. & W. R. R. Co. v. Wetherwood*, 82 Ala. 190; *Weems v. Weems*, 73 Ala. 462; *Collier v. Falk*, 61 Ala. 105-107.

SIMPSON, J.—The bill in this case was filed by the appellant against the appellee alleging that the complainant (Appellant) held a franchise from the corporate authorities of the city of Montgomery, to furnish electric lights, power, etc., under which it had strung wires on poles erected in the streets of said city.

That the defendant (appellee) had also received a franchise from said city for similar purposes, which contained a special proviso, that its poles and wires should not be erected and strung so as to interfere with the poles and wires of complainant. Also that the city council of said city, at a special meeting on May 30th, 1904, passed an ordinance allowing defendant to maintain, for a period of twenty days, from that date the line of wires then strung on their poles on Dexter Avenue, and to make all necessary connections therewith, but this permission was not to be effective unless the authorized officials of said company addressed a communication to the Mayor obligating themselves at the expiration of said twenty days to replace said wires, in accordance

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with such ordinances and regulations of the city Code, as may then be in force.

But the appellant claims that said ordinance or resolution is void because; 1st. That, under the charter of said city all ordinances intended to be of permanent operation, are required to be voted for by eight members of the fifteen composing the council, and another provision prohibits an alderman from voting "on any matter before the council, in which he or his employer has any personal interest," whereas, at the meeting at which this ordinance was adopted there were present only ten aldermen, of whom, two being stockholders in appellee corporation did not vote, but one Ryan, who is an employe, in business, of one Cobbs, who is a stockholder, did vote, thus leaving only seven legal votes. The bill then alleges that defendant "intends to proceed under said resolution to string its wires," etc., and that, if it does so "it will interfere with the poles and wires of orator and irreparably damage orator's wires," etc. And the prayer is for an injunction restraining the defendant "from stringing its wires, or doing or performing any other act contemplated by the resolution." The injunction was granted.

The answer of respondent claims that said last named ordinance, or resolution was not of a permanent nature, hence, there being a quorum present, and a majority of that quorum voting for it, it was properly passed; also claims that it had a right to string its wires and erect polls in the manner provided, even without said last ordinance, or resolution. It also denies fully all the allegations about irreparable injury, and alleges that the erection of the poles and wires as proposed would not interfere with complainant's property, franchise or rights at all. A demurrer is also incorporated in the answer, and complainant amends its bill, alleging that, since the adoption of the resolution by the city council, defendant, acting under the same, has connected its wires on Dexter Avenue with the place of business of one Dan Dowe, and is furnishing him light: That it is dangerous to life and property of citizens of Montgomery for defendant to be allowed to connect its wires as pro-

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vided by said resolution. That the meeting at which said resolution was adopted, was a special meeting, and all of the members of the council were not notified. That in the adoption of said resolution the rules were not suspended. That, at said meeting there were only seven qualified voters present, a quorum being eight.

The answer to the amendment, reflects the answer to the original bill, admits connecting its wires with Dowe, but denies that it acted contrary to any city ordinance, or in any way contravened the rights and privileges of complainant, denies all allegations of danger and avers that the present arrangement is less dangerous than the manner directed by the city ordinance before May 30th, 1904; alleges that the special council meeting was regularly and legally called and notice given to each member except Lobman and Sullivan, who were absent from the city both at the time of the call and at the time of the meeting. That, without affirming or denying the suspension of the rules, the ordinance of May 30th, 1904, was temporary in its character, and limited in operation, was reported by the committee having the entire subject of the electrical matters in hand. That said special meeting was called for the purpose of considering and acting on a general ordinance on these matters, but as the council were not prepared to agree on the general ordinances, the resolution in question was adopted for the purpose of giving the privileges thereby conferred temporarily to defendant, until the general ordinance could be considered and adopted. It also alleges that, at said special meeting, there were more than eight present, and a majority of those present voted for it.

The agreement of counsel, and the assignments of error limit the matters to be considered here to two; to wit; 1st. Whether the court erred in sustaining the demurrers to the bill as amended; and 2nd. Whether it erred in sustaining the motion to dissolve the preliminary injunction.

The assignments of causes of demurrer are numerous, but in substance they are; 1st. That the city should be made a party to the bill; 2nd. That the complainant has an adequate remedy at law; 3rd. As to the resolu-

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tion adopted by the city council, it was not of a permanent nature, consequently required only a majority of the quorum present to adopt it, and, if the rules should have been suspended to pass it, that was a mere irregularity, which would not make the resolution void; 4th. That, it does not appear from the bill that there was any reasonable apprehension that defendant was about to commit any wrongful or unauthorized act to the injury of complainant; 5th. That the allegations of the bill were mere conclusions of the pleader, and not statements of facts.

In the argument of counsel the particular causes of demurrer are not discussed, but appellant admits that, if its bill was "an effort to secure the relief sought, as in the cases of *Birmingham Traction Co. v. Sou. Bell Tel. Co.*, 119 Ala. 144; *H. A. & B. R. v. Birmingham Ry. & Elec. Co.*, 113 Ala. 239; *Am. Tel. Co. v. Morgan Co. Tel. Co.*, 36 So. Rep. 178," then the demurrer should be sustained, and he alleges that the chief equities of the bill consist in the facts; 1st. That appellee's franchise was obtained from the city council upon condition that the poles and wires of appellees should not be erected and strung so as to interfere with the poles and wires of appellant; and 2nd. That it was not incumbent upon appellants to set up the facts required by the decree of the court below, to wit; to state specific facts showing "how or why or to what extent injury will result to complainant."

The fact that defendant was under a contract obligation so to erect its poles and wires as "not to interfere with the poles and wires of complainant" does not change the rule of law that the complainant, seeking an injunction must, by his bill, show the necessity for it by the statement of facts, from which the court may decide, and not by the mere statement that complainant will be irreparably injured.

The only difference is that if the contract prescribed any terms different from those which the law would demand, without the special contract, then the allegations must be of facts which would show a violation of the

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contract, (or condition prescribed by the city ordinance) while, if there were no contract, or ordinance prescribing conditions, the allegations would have to show facts from which the law would infer, actionable injury.

So far as the public streets of a city are concerned, neither party can assert any exclusive rights thereon. Under the constitution of Alabama, it is not within the power of a municipal corporation to grant any exclusive privilege, in its streets to any corporation, so as to deprive itself of the right to revoke the same and grant like privileges to another.—Constitution, § 22; *Birmingham & P. M. R. Co. v. Birmingham S. Ry. Co.*, 79 Ala. 465.

Though, unquestionably, the municipality, after granting to a corporation the right to use its streets for a public utility, has the right, in granting like privileges to another, to provide such restrictions and regulations as are necessary to prevent injury to the property of the first occupant, and to prevent an interference with its discharge of the duties assumed to the public, and, where such inference involves danger to the public, the courts will prevent it, even without any ordinance.—*Consolidated Electric Light Co. v. Peoples' Electric Light & Gas Co.*, 94 Ala. 372.

In the present case it is shown that the defendant company, was granted by the city of Montgomery like rights and franchises on the streets of the city as had been granted to complainant, with a special proviso "that the poles and wires of said Citizen's Light Heat & Power Company should not be erected and strung so as to interfere with the poles and wires of 'the complainant company.' "

Taking the original and amended bills together, and for the present premitting all questions about the later ordinance of the city council, the allegations upon which the prayer for an injunction is based, are, that complainant "is informed and believes, and, upon such information and belief avers the facts to be that the said Citizen's Light, Heat & Power Company, intends to proceed * * * and string its wires," (on poles already erected on Dexter Avenue, and make necessary connec-

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tions therewith) which, it is alleged "will interfere with the poles and wires of your orator, and irreparably damage your orator's wires, and make it impossible for your orator to furnish light," etc., according to contract; and second, it is alleged, in the amendment, that said defendant has connected its wires with the place of business of Dan Dowe, and is furnishing him light, and that "it is dangerous to the life and property of the citizens of Montgomery for the defendant to be allowed to connect its wires" in the manner above stated.

These averments are mere conclusions of the pleader, and do not set out facts, upon which issue can be joined, testimony taken, and a decision had as to whether irreparable injury will be inflicted, or danger incurred by the stringing of the wires, or whether, in the terms of the ordinance, the poles and wires of complainant will be interfered with.—*Hays v. Ahlrichs*, 115 Ala. 239; *Schloss v. Steiner*, 100 Ala. 152; *Birmingham Traction Company v. Sou. Bell Tel. & Tel. Co.*, 119 Ala. 151.

So it seems to this court that the court below was correct in saying that much of the bill was devoted to unnecessary complaints about the resolution passed by the city council, of May 20th, 1904. That resolution seems to add nothing to the franchise previously granted to the defendant, further than to recognize the work already done by defendant, in so far as to allow its wires to be connected temporarily, (not permanently as appellant contends). The resolution requires an obligation by defendant, "at the expiration of 20 days to replace said wires in accordance with such ordinances and regulations of the city code, as may then be in force;" consequently, it was not a resolution of that "permanent character" requiring the concurrence of a majority of the entire board, and requiring it to be introduced at one sitting of the board and not passed until the next.

The inference would seem to be that if it was about to construct under this resolution, it would be in accordance with its requirements that the poles and wires of the complainant were not to be injured or interfered with, in accordance with the original ordinance, and that, at

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the end of 20 days, said wires were to be replaced in accordance with further directions by the city council. Certainly, without some definite statement of facts; showing how the work was being done, or other facts, from which, if true, the court could say that such injury would be the natural result, the averments of the bill are insufficient and the demurrers were properly sustained.

As to the correctness of the decree of the court, in sustaining the motion to dissolve the preliminary injunction: In addition to the defective averments of the bill, the answers of the respondent, make full denial of the allegations of injury and of danger. Then the question arises whether it is proper for the court to continue an injunction against one party at the instance of another, merely because the latter avers in general terms, that the former, in the legitimate pursuit of its own business is going to so conduct it, as to injure the latter, while the former has given solemn assurance that it will not do so, and, in its answer reiterates the assurance that it is not going to so construct the instrumentalities of its business, as to injure the other.

The general principle of law is that when the sworn answer denies the allegations of the bill upon which the relief is sought, the injunction will be dissolved.—*Hays v. Ahlrichs*, *supra*; *L. & N. R. Co. v. Bessemer*, 108 Ala. 239, 249; *Hartley v. Matthews*, 96 Ala. 224; *Jackson v. Jackson*, 91 Ala. 292.

It cannot be said that the constructing of the instrumentalities of defendant on the streets is a nuisance. The ordinance of the city shows that they are not erected without authority of law, and there are no allegations of facts, which show them to be a nuisance. As to the results to the parties from retaining or dissolving the injunction, the allegations of the bill and amendment, and the answer thereto, show that both parties were engaged in the same general business, incurring like burdens and expenses, so that the indications are that the injury resulting to the complainant, from the dissolution of the injunction would probably not be greater than those which would result to the respondent from retain-

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ing the same. Neither company has any special rights in the streets, except as granted by the municipal authorities, and when a telegraph, telephone or other electric company acquires rights over streets, it does not acquire a distinct part of the land, such as the right of way of a railroad company, over which another company cannot pass without instituting condemnation proceedings, but its rights are subject to the rights of every other company, to which the city may grant the right to string its wires over the streets, subject only to the right of the first to be protected from injury by the stringing of other wires so near as to injure its property or prevent its discharge of its duties to the public. It seems that, in this instance, the city has placed such conditions on the respondent company as to safeguard these points, and the court committed no error in sustaining the motion to dissolve the injunction.—*B. T. Co. v. S. B. T. & T. Co.*, 119 Ala. 144, 150-1; *A. T. & T. Co. v. M. C. T. Co.*, 138 Ala. 597.

The decree of the court is affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

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Action Against a Common Carrier for Failure to Safely Deliver Freight.

1. *Action against common carrier; sufficiency of complaint.*—In an action against a common carrier to recover damages for failure to safely deliver goods shipped over its lines, a count of the complaint which is substantially in the form prescribed by the Code for suit against a common carrier on a bill of lading, with some additional averments made necessary by the suit being brought against the defendant as a connecting carrier, sufficiently states a cause of action and is not subject to demurrer.

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2. *Same; contributory negligence no defense.*—In an action against a common carrier, which is not the initial carrier, for failure to safely deliver goods shipped over its line, a plea which sets up contributory negligence on the part of the plaintiff in that the goods were improperly loaded in the car of the initial carrier by plaintiff, or his agent, presents no defense and is subject to demurrer.
3. *Same; same; same; sufficiency of plea.*—In an action against a common carrier for failure to safely deliver goods shipped over its line, a plea which after setting up as a defense the contributory negligence on the part of plaintiff then avers "that the goods were not injured or damaged while in the possession of this defendant" presents a defense, since if the goods were not damaged or injured while in the possession of the defendant there would be no liability on the part of the defendant.
4. *Same; same.*—In such a suit where there were several connecting carriers and an action is brought against the delivering carrier, a plea which avers that the car in which plaintiff's goods were transported was received by defendant from a connecting carrier and was closed and sealed and so remained from the time of its delivery to defendant until it was delivered to plaintiff, and that the contents of the said car could not be seen by defendant without its breaking the seal and opening the car, and that the contents of the car was not visible or known to defendant when it was received from the connecting carrier, and that defendant hauled said carload of goods from the place where it was delivered to defendant to its place of destination in the same condition in which it was received, and delivered same to plaintiff in such condition, and that if said goods were damaged as alleged in the complaint it was not through the fault or negligence of the defendant, and is not subject to demurrer.
5. *Action against common carrier; burden of proof.*—In an action against a common carrier for failure to safely deliver goods shipped over its lines, where it is shown that the defendant was one of several connecting carriers, and was the discharging or delivering carrier, and the contract of affreightment stipulated that the liability of each line is limited to loss of injury occurring on its line, if it appear that the goods were in sound condition when received by the initial carrier, and it is further shown that upon their delivery to the plaintiff they were in a damaged condition, the burden is upon the defendant to show that the damage or injury did not occur while

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- the goods were in its possession or under its control, as a common carrier.
- 6. *Action against common carrier; right of consignee to maintain suit for damage to goods shipped over lines of common carrier, and there is no reservation of title by the consignor.* The consignee of goods has the right to sue for their loss or damage by a common carrier, notwithstanding he may not own all of the goods, or when another party may be the owner of them.

APPEAL from the City Court of Birmingham.

Tried before the Hon. CHAS. A. SENN.

This was an action brought by the appellant, Wm. D. Walter, against the Alabama Great Southern R. R. Company to recover damages for loss of and injury to freight which had been shipped over defendant's railroad. The complaint originally filed contained only one count, which was in words and figures as follows: 1. "The plaintiff claims of the defendant the sum of one thousand dollars damages for that whereas, on, to-wit, the 19th day of October, 1901, the plaintiff delivered to New York Central & Hudson River Railroad Company, at Syracuse, in the State of New York, a lot of household goods to be carried to Ensley, Alabama, and there delivered to the plaintiff. Said household goods were delivered to and received by the defendant and by the defendant carried to said Ensley. The defendant received said household goods as a common carrier, and as a connecting carrier on the route between said Syracuse and said Ensley, to be delivered to the plaintiff at said Ensley, for reward. Said defendant did not safely carry and deliver said household goods as it was its duty to do, but, on the contrary, conducted itself so carelessly in and about carrying, transporting and delivering the same, that said household goods were damaged, broken, destroyed, injured and rendered valueless to the plaintiff, to the damage of the plaintiff and in the sum of one thousand dollars, which amount to recover he brings this suit." The complaint was amended by adding two other counts, which were in words and figures as follows: "2. The plaintiff claims of the defendant the sum of one thousand dollars as damages for that on, to-wit, the 19th day of Oc-

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tober, 1901, the defendant was a common carrier, and defendant has ever since said date been such common carrier, and that on, to-wit, the said 19th day of October, 1901, the plaintiff delivered to the New York Central & Hudson River Railroad Company, at Syracuse, in the State of New York, a lot of household goods to be carried to Ensley, Alabama, and there delivered to plaintiff, and the defendant as a common carrier as aforesaid operating a connecting line of railway on the route from Syracuse, New York, to Ensley, Alabama, received the said goods and undertook to deliver the same to the plaintiff at Ensley, Alabama, for a reward. And the plaintiff avers that the defendant did not deliver said goods to the plaintiff in good or proper condition or in the condition they were in when received by it, but that said goods when delivered to plaintiff were badly broken, injured and damaged, and a large part thereof rendered wholly unfit for use, and the plaintiff was damaged thereby to the amount above claimed."

To the second count of the complaint the defendant demurred upon the following grounds: 1. Said count does not aver or show that the goods of the plaintiff were in good condition when delivered to the New York Central & Hudson River R. R. Co. 2. Said count does not aver or show that the goods of the plaintiff were in good condition when received by the defendant as a connecting or delivering carrier. 3. Said count does not aver or show that the goods were injured or damaged or broken while in possession or under the control of the defendant. 4. Said count does not aver or show that defendant or any of its agents or servants in any way injured or damaged the goods of plaintiff. These demurrers were sustained.

The defendant pleaded the general issue and assigned special pleas numbered three and four. The substance of the third plea as originally filed, and as amended, is sufficiently shown in the opinion. The fourth plea, as amended was in words and figures as follows: 4. "That the car in which plaintiff's goods were transported was received by the defendant from the Southern Railway Company at Chattanooga in the State of Tennessee, closed and sealed, and remained closed and sealed from:

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the time of its reception to the time of its delivery to the plaintiff at Ensley. And the defendant avers that the contents of said car could not be seen by the defendant without its breaking the seal and opening the car; and the defendant further avers that the condition of the contents of said car was not visible to this defendant, or its agents, when so received by it from the Southern Railway Company, and that the defendant hauled said carload of goods from the said Chattanooga, Tennessee, to the city of Birmingham in the same condition in which it received said goods, and delivered the same to the plaintiff or a connecting carrier at said Birmingham in such condition, and that if said goods were damaged, as alleged in said complaint, it was not through the fault or negligence of this defendant or its servants."

To the third plea, as amended, the plaintiff filed demurrers, among others, the following: 1. The negligence of plaintiff contributing to the injury to said goods does not relieve the defendant from liability for the injury thereto. 2. The defendant does not show or aver that it was not guilty of negligence in handling or caring for said goods or that it was without fault. 3. The defendant in said plea does not show or allege that the breaking of and injury to said goods were caused solely by the improper loading thereof. 4. The defendant in said plea does not show or allege that the receiving carrier did not know or could not have known that the said goods were improperly loaded when it received the same. The demurrers to the third and fourth pleas, as amended, respectively, were separately and severally overruled.

The other facts of the case are sufficiently stated in the opinion.

The plaintiff requested the court to give to the jury the following written charge, and severally and separately excepted to the court's refusal to give each of them as asked:

(1.) "The court instructs the jury that, if they believe the evidence in this case, they must find a verdict for the plaintiff."

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(2.) "If the plaintiff is entitled to recover in this action, he is entitled to recover for injury to all the goods consigned to him, whether all the said goods belonged to him or not."

(3.) "The court instructs the jury that, if they find for the plaintiff in this case, they may award the plaintiff damages for injury to all the goods consigned to him, although some of the said goods may have belonged to the plaintiff's wife."

(4.) "The court instructs the jury that the plaintiff is entitled to recover in this action, unless they find from the evidence that the defendant delivered the said car load of goods to another connecting carrier and ceased from that time to exercise all jurisdiction or control over the said car load of goods, before the delivery of the said car load of goods to the plaintiff."

At the request of the defendant the court gave the general affirmative charge in its favor, and to the giving of this charge the plaintiff duly excepted.

There was a verdict and judgment for the defendant. The plaintiff appeals and assigns as error the rulings of the trial court upon the pleadings, which were adverse to him, and the other rulings of the trial court to which exceptions were reserved.

FRANK DEEDMEYER and JAMES A. MITCHELL, for appellant.

The trial court erred in sustaining the demurrer to the second count of plaintiff's complaint. This is the Code form with the necessary additional averment on account of the defendant being a connecting carrier.—Code, Section 3352, page 946. form 15; *McCarthy & Baldwin v. L. & N. R. R. Co.*, 102 Ala. 193.

The trial court erred in overruling plaintiff's demurrer to the defendant's third plea as amended. It is true that the amendment to this plea contains an averment that the goods were not injured while in the possession of the defendant (page 7 Record), still the plea contains a further averment that the alleged negligence of the plaintiff in loading the goods "proximately contributed" to the injury to the goods, and this is an admission

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that the defendant was guilty of negligence.—*McCarthy & Baldwin v. L. & N. R. R. Co.*, 102 Ala. 193.

The trial court should have given the general affirmative charge for the plaintiff, as the evidence was uncontradicted that the goods were injured between the time of shipment and the time of delivery by the defendant at Ensley, and it was admitted by the defendant that it received the car of goods as a connecting carrier and delivered the same to the plaintiff at the destination. *Southern Express Co. v. Armstead*, 50 Ala. 350; *Mobile & Girard R. Co. v. Williams*, 54 Ala. 171; *Robinson v. Pogue*, 86 Ala. 261; *Southern Ex. Co. v. Caperton*, 44 Ala. 101; *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. Rep. 509; *Taylor v. Steamboat Robt. Campbell*, 20 Mo. 254. The presumption is that the defendant received the goods in the same condition that they were in when delivered to the initial carrier, and the defendant failed to rebut this presumption by any proof or to introduce evidence tending to support all the averments of either of its special pleas.—*Louisville & Nashville R. R. Co. v. Jones*, 100 Ala. 263; *Cooper v. Ga. Pac. Rwy. Co.*, 92 Ala. 329.

Each of the charges numbered two and three, requested in writing by the plaintiff, should have been given.

The giving of the general affirmative charge for the defendant was error.—*L. & N. R. R. Co. v. Landers*, 33 Sou. Rep. 482, 135 Ala. 504.

A. G. & E. D. SMITH, *contra*.—There is no presumption raised against the appellee, an intermediate carrier, because the goods were delivered in a damaged condition, and does not cast on the appellee the burden of showing that the goods were in good condition when delivered by it to the delivering carrier.—*M. & E. R. R. Co. v. Culver*, 75 Ala. 587.

The bill of lading, a copy of which is in the record, limits the liability of each connecting carrier to its own line. Even if that were not the contract of affreightment, the law does not hold one connecting carrier liable for loss or damage sustained on the road of another,

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unless there be some special contract to that effect.—*M. & E. R. R. Co. v. Culver*, 75 Ala. 587; *K. C. M. & B. R. Co. v. Foster*, 32 So. Rep. 773; 134 Ala. 244; *R. R. Co. v. Moore*, 51 Ala. 394; *Jones v. R. R. Co.*, 89 Ala. 376; *G. P. R. R. Co. v. Hugbart*, 90 Ala. 36.

Appellant insists that he has the right to recover for all of the goods alleged to have been damaged, inasmuch as he was the consignee, even though only a small portion belonged to him. The undisputed evidence showed that a large part of the goods belonged to his wife. For these goods he could not recover, even if the appellant was liable under the law and evidence, which we confidently assert it is not.—*L. & N. R. R. Co. v. Allgood*, 113 Ala. 168; *Capehart v. Furnace Co.*, 103 Ala. 671.

DENSON, J.—The complaint in this case when filed contained only one count. By leave of the court the plaintiff amended the complaint by adding a second count. The second count is substantially in the form prescribed by the code, No. 15, page 946, for suit against a common carrier on a bill of lading, with some additional averments made necessary by the suit having been brought against the defendant as a connecting carrier. The demurrer to this count was improperly sustained. *McCarthy & Baldwin v. L. & N. R. R. Co.*, 102 Ala. 193; *L. & N. R. R. Co. v. Landers*, 135 Ala. 504.

After demurrers were sustained to count two the complaint was amended by adding count three. The case was tried on counts one and three. To these counts the defendant plead the general issue and two special pleas numbered 3 and 4. The plaintiff demurred to the special pleas, the court sustained the demurrers, the defendant amended the pleas and the court then overruled the demurrers.

Count three as originally written sought to set up contributory negligence on the part of the plaintiff, in that the goods were improperly loaded on the car of the initial carrier by the plaintiff or his agent. That, under contracts of carriage such as are averred in the

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first and second counts of the complaint, contributory negligence, on the part of the shipper, is not available as a defense, has been fully and clearly settled by this court. *McCarthy & Baldwin v. L. & N. R. R. Co.*, 102 Ala. 193.

The defendant's amendment to plea 3 was made, by adding at the end of it, these words, "and said household goods were not injured or damaged while in the possession of this defendant." After this amendment the demurrers were refiled and the court overruled them. The plea is substantially the same as plea numbered 6 which was filed in the case last above cited, and in making the amendment, it must have been intended by the pleader, to relieve the plea of the criticism made by this court on that plea, and to negative all negligence on the part of the defendant in relation to the holding and carriage of the goods. The amendment is repugnant to and inconsistent with the admission of defendant's negligence implied in the allegation that plaintiff's negligence contributed to the injury. However, the amendment to the plea within itself, presented a defense to the plaintiff's cause of action. The defendant being the discharging or delivering carrier was liable only for injuries to the property occurring on its own line or while in its possession.—*Montgomery & West Point R. R. Co. v. Moore*, 51 Ala. 394; *Mobile & Girard R. R. Co. v. Copeland*, 63 Ala. 219; *Montgomery & Eufaula Ry. Co. v. Culver*, 75 Ala. 587; *K. C. M. & B. R. R. Co. v. Foster*, 134 Ala. 244.

The plea avers that the goods were not damaged or injured while in the possession of the defendant. Proof of this averment would have acquitted defendant of liability. It being true that the amendment within itself presented a good defense, the plaintiff may have gotten rid of the objectionable features of the plea, by motion to strike the immaterial part of it.—*Bain v. Wells*, 107 Ala. 562; *Ansley v. Bank of Piedmont*, 113 Ala. 467.

Furthermore, the plea attempted to set up two defenses, and to make the defense under the plea effectual, it was incumbent on the defendant to sustain the truth of both these defenses, set up and connected as they were in one plea, and if one defense was good, but could not

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avail the defendant without proof also of the immaterial defense, this was no detriment to the plaintiff.—*King v. Peoples Bank*, 127 Ala. 266; *Bienville W. S. Co. v. The City of Mobile*, 125 Ala. 178. We think there was no error in overruling the demurrer as made, to plea three as amended. Moreover, the proof without conflict showed that the goods were properly loaded.—*Mizzell v. Southern Ry. Co.*, 132 Ala. 504.

Plea four as amended, was not subject to demurrer upon the grounds assigned to it, and the court committed no error in overruling the demurrer to that plea.—*McCarthy & Baldwin v. L. & N. R. R. Co.*, *supra*.

The evidence without conflict showed that the plaintiff, William D. Walter, delivered to the New York Central & Hudson River Railroad Company, a common carrier of goods, at Syracuse, New York, a car load lot of household goods to be carried to Ensley, Alabama, and there to be delivered to the plaintiff for a reward. That the goods were in good condition when they were delivered to said carrier; that they were properly packed and properly loaded on the car at Syracuse by the plaintiff; that the car was then closed and sealed by the New York Central & Hudson River Railroad Company. That said company issued to plaintiff a through bill of lading for said car load of goods, to Ensley, Alabama, that the plaintiff was the consignee. In the bill of lading is contained the usual stipulation limiting the liability of each connecting carrier to loss which may occur on its own line. It was conceded that the defendant, Alabama Great Southern Railroad Company, was a connecting carrier en route from Syracuse to Ensley, and that the car of goods involved in this suit passed over its line en route to Ensley. One contention of the plaintiff in the court below was that the defendant, Alabama Great Southern Railroad Company, was the discharging or delivering carrier, and that the goods were delivered by the defendant to plaintiff at Ensley. The defendant in respect to this contention of plaintiff insisted that it delivered the goods to the Southern Railway Company at Birmingham, Alabama, and that it was only an intermediate carrier. The 8th assignment of error presents

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for consideration the propriety of the action of the city court in giving the general affirmative charge requested by the defendant in writing.

One of the questions to be considered in connection with this assignment of error is, was there any evidence from which the jury might reasonably have inferred that the defendant Alabama Great Southern Railroad Company. was the discharging or delivering carrier? We have carefully considered the evidence bearing upon this point as set out in the record, and our conclusion is that there was ample evidence from which the jury might have been warranted in drawing the conclusion, and we may add that, it is questionable whether any other inference would be a reasonable one. At least the court was not warranted in giving the charge requested, upon the theory that the evidence did not warrant the submission of this question to the jury. The trial was had before the case of *L. & N. R. R. Co. v. Landers*, 135 Ala. 504, which overruled the case of *N. C. & St. L. R. Co. v. Parker*, 123 Ala. 683, had been decided, and we presume the trial court was influenced in its rulings by the Parker case.

It is well settled that where there are connecting carriers, as in the case at bar, in the absence of a special contract, or some relation between them, each connecting carrier is liable only for a loss or injury on its line. In the case here, we have seen that the contract stipulates that the liability of each line is limited to loss or injury occurring on its own line.—*K. C. M. & B. R. Co. v. Foster*, 134 Ala. 244, and authorities there cited.

If the defendant was the discharging or delivering carrier, and the goods were in good condition when received by the initial carrier, then upon proof made that, when the goods were delivered to plaintiff, they were in a damaged condition, were injured, then it devolved upon the defendant to show the condition of the goods when received by it. In other words, to show that the damage or injury did not occur, while the goods were in its possession or control as a common carrier.—*Montgomery & Eufaula Railway Co. v. Culver*, 75 Ala. 587.

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We do not think that the evidence in the case was sufficient to warrant the court in charging the jury as matter of law, that the defendant had met the burden which rested upon it as a delivering or discharging carrier. The action of the court in giving the affirmative charge for the defendant was erroneous.

The evidence showed that the plaintiff was a married man, that the goods were household goods and were used by plaintiff and his wife jointly, prior to the time of shipment, in their house, at Syracuse, New York; that the plaintiff and his wife was moving to Ensley, Alabama, where the goods were shipped, and the goods were shipped to be used at Ensley by them jointly; that a part of the goods belonged to the plaintiff in person and that the articles of said goods that belonged to the plaintiff in person were damaged between the time of shipment and the time of delivery to him at Ensley in an amount between one hundred and twenty-five and one hundred and fifty dollars; that a part of the remainder of said goods had been bought by the wife with money that had been given to her by her husband and that they were bought for use in their house, and the rest of the goods the wife acquired independently of the husband and owned them before the marriage.

In the case of *Southern Express Company v. Armstead*, 50 Ala. 350, the question as to the right of a consignee, who was not the absolute owner of the property, to maintain a suit against the carrier arose, and the court held that; "The consignee of goods has a right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally, the property vests in him by mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for an injury thereto, if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue, notwithstanding he has never had the actual possession."

Judge Sommerville, speaking for the court, in the case of *Robinson & Ledyard v. Pogue & Son*, 86 Ala. 257, said: "It is commonly held, that the consignee in a bill of la-

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ding, where there is no reservation of title by the consignor, has vested in him such a property in the goods as to authorize him to sue the carrier, in his own name, for their injury, loss or recovery, in trover, detinue, or other appropriate action." In the case last cited, the case in 50th Alabama, above quoted from, is cited as authority.

There is nothing decided in the case of *Capehart et al. v. Furman Farm Improvement Co.*, 103 Ala. 671 and *L. & N. R. R. Co. v. Allgood*, 113 Ala. 163, when applied to the facts of the case in hand, that conflicts with the principle above announced.

We think charges 2 and 3 requested by plaintiff are open to the criticism, that it was assumed in each of them, that all of the goods were damaged or injured, and for this reason there was no error in their refusal.

There was no error in the refusal of the court to give charge numbered 1, requested by the plaintiff.

Charge numbered 4, requested by the plaintiff pretermits any inquiry as to whether the injury to the goods occurred on defendant's line, or while in defendant's possession as a carrier, and for this reason, if for no other, its refusal was correct.

For the errors pointed out, the judgment of the city court must be reversed.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DOWDELL, J.J., concurring.

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Statutory Bills to determine Claims to Real Estate and Quiet Title thereto.

1. *Statutory bill to quiet title; what possession necessary to maintain it.*—To maintain a bill under the statute for the determination of claims to real estate and to quiet title thereto, it
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is necessary for the complainant to aver and prove that at the time of the institution of the suit the complainant's possession to the lands involved was peaceable, as contradistinguished from disputed or contested possession, and that it was under claim of ownership.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

The bill in this case was filed by the appellant, Emily C. Lyon against George E. Arndt, and was filed under the statute authorizing the filing of bills in chancery to quiet title, and to determine claims for real estate. In the bill the complaint averred that she was in the actual, peaceable possession of the lands described, claiming to own and did own the same. The other averment of the bill were in substantial compliance with the statute.

The respondent, in his answer, denied that the complainant owned the lands, or was in peaceable possession of them before the institution of the suit, and averred that at the time of the institution of the suit the complainant's title and right to possession was disputed. The evidence introduced was in irreconcilable conflict; the testimony for the complainant tending to show that her agent had built a one-room house on the lands before the institution of the suit, and that timber had been cut from the land under her authority. While the testimony for the defendant tended to show that he purchased the lands after the institution of the suit, and that his grantors and those through whom he claimed had been in peaceable possession of the land for many years.

On the final submission of the cause upon the pleadings and proof, the chancellor decreed that the complainant was not entitled to relief, and ordered the bill dismissed, he reciting in his opinion that the evidence was not satisfactory to show that complainant was in peaceable possession at the time of the institution of the suit.

From this decree the complainant appeals and assigns the rendition thereof as error.

ERVIN & MCALEER, for appellant.

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CHARLES L. BROMBERG and MASSEY WILSON, *contra*, cited Code of Ala. 1896, § 809-10; *Brand v. U. S. Car Co.*, 128 Ala. 579; *Adler v. Sullivan*, 115 Ala. 586-7.

ANDERSON, J.—To maintain this bill it requires a peaceable possession as contradistinguished from disputed or contested possession and that it should be under claim of ownership.—Code, 1896, § 803; *Brand v. U. S. Car Co.*, 128 Ala. 579; *Adler v. Sullivan*, 115 Ala. 582.

We think the facts fully warranted the chancellor in dismissing the bill upon the final hearing.

Affirmed.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

Berry Lumber Co. v. Garner *et al.*

Bill in Equity for Sale of Lands for Division among Tenants in Common.

1. *Bill by tenants in common for sale of lands; when sale properly ordered, notwithstanding failure to make proof that lands could not be equitably divided.*—Where a bill is filed by tenants in common against other co-tenants for the purpose of having the lands sold, and the proceeds divided among the tenants, and it is averred in the bill that said “lands cannot be equitably divided among the tenants in common aforesaid, without a sale thereof,” and in their answers the defendants fail to deny this averment in said bill, the fact that there was no evidence introduced that the lands could not be equitably partitioned, does not make a decree ordering the sale erroneous, if complainant is otherwise shown to be entitled to such relief; since the failure on the part of the defendants to deny such averment of the bill was an admission of the truth of that averment in said bill, the fact that there was no evidence introduced that the lands could not be equitably partitioned, does not make a decree ordering the sale erroneous, if complainant is otherwise shown to be entitled to such relief;

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since the failure on the part of the defendants to deny such averment of the bill was an admission of the truth of that averment, dispensing with the necessity for evidence.

APPEAL from the Chancery Court of Coffee.

Heard before the Hon. W. L. PARKS.

The appeal in this case is prosecuted from a decree granting the relief prayed by the complainants in a bill filed for the purpose of having lands sold, and the proceeds divided between the complainants and respondent, who were tenants in common of said lands.

The facts of the case are sufficiently stated in the opinion.

MULKEY & CARMICHAEL, for appellants.—Cited. Code 1896, § 3181; *Mitchell v. Mitchell*, 101 Ala. 183; *Keeton v. Terry*, 93 Ala. 84; *McEvoy v. Leonard*, 89 Ala. 457.

No counsel marked for appellee.

McCLELLAN, C. J.—This bill is filed by Minnie Garner and others against the Berry Lumber Company. It avers that complainants and respondents are tenants in common in certain lands, and sets forth the interest of each party. It is further averred that the respondent is in possession of the land and has been for some years, and this is admitted by the answer. And the further averment is made that said “lands cannot be equitably divided among the tenants in common aforesaid without a sale thereof.” The prayer is for a sale of the land, and for a division of the proceeds among the tenants; and this relief was decreed. The only point made here against the decree is that there was no evidence that the lands could not be equitably partitioned. There was no evidence on this point. But the answer failed to deny the averment to this effect in the bill. If the lands were susceptible of equitable partition, the fact was within the knowledge of the respondent. Its failure to deny the averment of the bill to the contrary was an admission of the truth of that averment dispensing with the necessity for evidence.—*Grady et al. v. Robinson*, 28 Ala. 289;

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Smilie v. Silers' Admr., 35 Ala. 88; *Moog et ux v. Borrow et al.*, 101 Ala. 209.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

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Randle et al. v. Daughdrill et al.

Bill in Equity to Determine Claims to Real Estate and to Quiet the Title thereto.

1. *Statutory bill to quiet title; what possession necessary to maintain it.*—To maintain a bill under the statute to compel determination of claims to real estate and to quiet title thereto, it must be shown that complainant was in the peaceable possession of said property as contradistinguished from contested or disputed possession.
2. *Same; same; sufficiency of evidence.*—In such cases where the evidence shows that the land in question was wild and uncultivated land; that the defendant claims under a deed; pays taxes thereon; has kept trespassers off said property, and has taken tan bark therefrom, it cannot be said that the plaintiff is shown to have such peaceable possession as entitles him to relief.

APPEAL from Chancery Court of Cherokee.

Tried before the Hon. RICHARD B. KELLY.

The bill in this case was filed by appellees against the appellants for the purpose of determining claim to real estate and quieting the title to same under the provisions of the statute. The complainants claimed to own the property described in the bill of complaint as the heirs of Lemuel J. Standifer, and they averred in their bill that they were in the quiet and peaceable possession of said property, and that there was no suit pending to test the validity of the title thereto. It was further averred in the bill that the lands involved in the suit were wild and unimproved lands; that they were without build-

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ings; that there was no enclosures thereon, and that no part of said lands were cleared or in cultivation. The defendants in their answer set up a claim to said property as a vendee from the purchaser of said lands at a tax sale, and it was averred in the answer that the defendant Mrs. Mary E. Randle was at the time of the filing of the bill in the peaceable possession of the same and exercising acts of ownership over same.

The complainants introduced testimony which showed that Lemuel J. Standifer entered the lands involved in the suit and received a patent from the Government thereto, and that the complainants were the heirs of the said Standifer; that the lands were wild and wooded lands, and that complainants had constructive possession thereof. The testimony for the defendant tended to show that Mrs. Randle had received a deed to the lands from the purchaser thereof at a tax sale—the delinquent taxes being due from the said Lemuel J. Standifer. There was other testimony for the defendant tending to show that she paid taxes on the lands after her purchase; that she kept trespassers off; that she had cut tan bark from the lands, and had posted notices, warning people not to trespass on said property, and had objected to same parties cutting cross ties from said lands.

Upon the final submission of the case upon the pleadings and proof, the Chancellor decided that the complainants were entitled to the lands, and so ordered. From this decree the appellant appeals and assigns as error the rulings of the court below.

BURNETT, HOOD & MURPHREE, for appellant.—Cited. *Adler v. Sullivan*, 115 Ala. 584 and 587; *Holmes v. Chester*, 26 N. J. Equity 81; 4 Mayfield Digest, Sec. 13 c; *Brann v. Roe*, 43 Ala. 271 and *Abbott v. Page*, 92 Ala. 571.

JAMES AIKEN and T. J. BURTON, *contra*.—Cited *Jackson v. Kirksey*, 110 Ala. 547; *Nolen v. Doss*, 133 Ala. 259.

ANDERSON, J.—The complainants filed their bill to quiet title to land, under sections 809 to 814 of the Code of 1896.

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This court has repeatedly held that in order to maintain the bill the proof must show a peaceable possession in the complainant as contradistinguished from a contested, disputed or scrambling possession.—*Lynn v. Arndt*, in MS.,; *Brand v. M. S. C. Co.*, 128 Ala. 579; *Adler v. Sullivan*, 115 Ala. 582.

While we do not wish to be understood as holding that respondents have a valid title under the tax sale or to decide in whom is reposed the possession of this land, we do not think the possessory acts of respondents, as shown by the proof, were sufficient to show that complainants did not have the peaceable possession of the land.

A decree pro confesso having been rendered against respondents J. M. Randle, Lowe and Burnett and who do not assign error in this court, this appeal is affirmed as to them. Reversed as to Many E. Randle and a decree will be here rendered dismissing the bill as to her and the costs of the appeal are taxed against the complainants.

Reversed and rendered.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

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*Action against Street Railway Company by Passenger
to Recover Damages for Personal Injuries.*

1. *Action by passenger for personal injuries; sufficiency of complaint.*—In a suit brought by a passenger against a street railroad company to recover damages for personal injuries, a count of the complaint which avers that "defendant was negligently operating said car at or near a point on defendant's line * * * that while plaintiff was engaged in or about to alight from said car, his body, as a proximate conse-
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quence of said negligence, was caused to leave said car and strike the street with great force and violence, whereby plaintiff was bruised," states a cause of action.

2. *Same; same.*—In such an action a count of the complaint which avers that the plaintiff "had informed the defendant's servant, the conductor or motorman of said car, of his purpose and desire to alight from said car * * * , that it was and then became the duty of defendant's servant, after slackening and reducing the speed of said car, not to increase the speed of said car until plaintiff had alighted from said car, or had had a reasonable opportunity to alight from said car; that, notwithstanding said duty, the defendant's servant negligently, suddenly and greatly increased the speed of said car before plaintiff had alighted therefrom, and before plaintiff had had a reasonable opportunity to alight therefrom; that as a proximate consequence of said negligence," plaintiff suffered the injuries complained of,—is faulty in assuming instead of alleging that defendant's servant slackened the speed of the car, upon being informed that the plaintiff desired to alight therefrom, and in not alleging that it was the duty of defendant's servant to decrease the speed then and there; but said count is not subject to demurrer upon the ground that it does not appear therefrom that at the time of the increase of the speed of the car, the plaintiff was in the act of alighting therefrom, and said complaint states a cause of action.
3. *Same; same; when count does not charge willfulness, wantonness or recklessness.*—In such a case where a count of the complaint, after stating that plaintiff was a passenger, and that there was duty on the part of defendant's servant to plaintiff not to increase the speed of the car after being advised that plaintiff desired the car stopped that he might alight, then alleges that "the said motorman, the defendant well knowing that plaintiff was seeking to alight, and well knowing that a sudden jerk would probably throw plaintiff from the car, with wanton and willful, or reckless negligence, suddenly increased the speed of said car, and as a proximate consequence thereof," plaintiff was thrown from the car and injured, such count of the complaint does not aver that the motorman wantonly, willfully or recklessly caused plaintiff's fall, and therefore pleas of contributory negligence on the part of plaintiff set up a defense to such count.
4. *Same; same; same.*—Such count is inapt, if not affirmatively bad as one alleging willful injury inflicted by the motorman in that it avers not that the motorman had knowledge of the

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probable disastrous consequence of his act, but that the "defendant" had such knowledge; and the knowledge of the defendant in its corporate capacity, is not sufficient to characterize the act of the plaintiff on the part of the motorman as being willful.

- 5 *Action against street railroad company by passenger; contributory negligence.*—Where a passenger upon a street car steps off the car backwards while it is going at the rate of 5 or 6 miles an hour, or with his face towards the rear of the car, he is guilty of contributory negligence, which precludes his recovery for injuries sustained, by reason of trying in this way to alight from the car.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. A. A. COLEMAN.

This was an action brought by the appellee against the appellant, Birmingham Railway, Light & Power Company, to recover damages for personal injuries. The complaint contains 5 counts. The first count of the complaint was in words and figures as follows: 1. "Plaintiff claims of the defendant the sum of five thousand dollars, as damages, for that heretofore, to-wit, on the 23rd day of August, 1902, the defendant was a common carrier of passengers for hire or reward from that part of Birmingham, Jefferson County, Ala., known as the South Side to Jonesville by means of a certain car operated and propelled along its rails and track by means of electricity; that plaintiff was a passenger on said car and that the defendant so negligently operated said car at or near a point on defendant's line of street railroad, to-wit, Avenue A. and 20th street, in the City of Birmingham, that while plaintiff was engaged in or about alighting from said car at or about Avenue A and 20th street, his body, as a proximate consequence of said negligence, was caused to leave said car and strike the street with great force and violence, whereby plaintiff was bruised and lacerated, his head was split open, his hip and arm were injured, he was rendered unconscious, and was made sore and sick and suffered great mental and physical pain and loss of time from his work, and was rendered much less able to work and earn money,

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and was put to great expense for medical attention, medicine, care and nursing in his said efforts to heal and cure his said wounds and injuries." The second count was stricken, and the substance of the third and fifth counts is sufficiently shown in the opinion. To the first count of the complaint, the defendant demurred upon the ground that the allegations of negligence contained therein was but the affirmance of the conclusion, and that said count contained no allegation of fact showing what constituted the negligence complained of. To the 3d count of the complaint the defendant demurred on the following grounds: (A) "For that it does not appear therefrom that at the time of the alleged increase of speed of the said car the plaintiff was in the act of alighting therefrom. (B) For that for aught that appears by the allegations of the said count of said complaint the plaintiff may have been seated in his seat on the car at the time of the alleged increase of speed of said car. (C) For that it is not alleged therein that the plaintiff was in the act of alighting from the defendant's car at the time the speed of the said car was increased." To the 5th count of the complaint the defendant demurred on the following grounds: (A) "For that it is not averred therein that the defendant wantonly, willfully or recklessly inflicted injury upon plaintiff. (B) For that the allegations that the motorman with wanton, willful or reckless negligence, suddenly increased the speed of said car, is not equivalent to an allegation that the said motorman wantonly, willfully or recklessly inflicted injury upon the plaintiff. (C) For that the allegations thereof are repugnant in this, that the same seeks to charge the defendant with the wanton, willful or reckless infliction of the injury while the facts averred in the said count of said complaint constitute but simple negligence." These demurrers were overruled.

The defendant pleaded the general issue and three special pleas, setting up the contributory negligence

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on the part of the plaintiff. The plaintiff demurred to the special pleas of contributory negligence as an answer to the 5th count of the complaint, upon the ground that the alleged contributory negligence was no answer to said complaint. This demurrer was sustained, and the defendant duly excepted.

The plaintiff introduced evidence tending to show that the plaintiff was a passenger on one of the defendant's cars, as alleged in several counts of the complaint, and was thrown off of said car, and sustained the injuries complained of, by reason of a sudden jerk of said car while he was trying to alight therefrom, such jerk having been caused by a sudden increase of speed of said car.

The testimony of the defendant tended to show that while the defendant's car was running at a rate of 5 or 6 miles an hour, the plaintiff stepped off of said car backwards on to the ground, or with his face towards the rear of the car, and that there was a sudden jerk of the car at the time the plaintiff attempted to alight therefrom. Among the charges given by the court at the request of the plaintiff, and to the giving of each of which the defendant separately excepted, was the following: (5) "I charge you that as a matter of law it would not have been contributory negligence for the plaintiff to even step off of the car while moving; it is a question for you to decide." The defendant requested the court to give to the jury the general affirmative charge as to each of the several counts of the complaint, and to the court's refusal to give each of said charges as asked, the defendant separately excepted.

There were verdict and judgment in favor of the plaintiff, sustaining his damages at \$300.00. The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved.

WALKER, TILLMAN, CAMPBELL & MORROW, for appellant.—Cited *L. & N. R. R. Co. v. Barker*, 96 Ala. 435; *Kansas City, Memphis & Birmingham R. R. Co. v. Crocker*, 95 Ala. 412.

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DILL & ALLEN, *contra*.—Cited *Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 262; *Ala. Grt. Sou. R. R. Co. v. Burgess*, 116 Ala. 515.

McCLELLAN, C. J.—It is sufficient in a complaint by a passenger against a railway company claiming damages for personal injuries to aver that the defendant negligently operated its train and that thereby or in consequence thereof the plaintiff was injured, etc., etc. The charge of negligence made by the first count is sufficient.

The 3rd count of the complaint avers that plaintiff was a passenger on defendant's electric street car, and "had informed the defendant's servant, the conductor or motorman of said car, of his purpose and desire to alight from said car at or near Avenue A and 20th Street; that it was and then became the duty of defendant's servant after slackening and reducing the speed of said car not to increase the speed of said car until plaintiff had alighted from said car or had had reasonable opportunity to alight from said car; that notwithstanding said duty, the defendant's servant negligently, suddenly and greatly increased the speed of said car before plaintiff had alighted therefrom and before plaintiff had had reasonable opportunity to alight therefrom; plaintiff says that as a proximate consequence of said negligence, plaintiff's body was caused to leave or be thrown from said car, and to strike the street with great force and violence causing plaintiff to suffer the injuries and damages set forth in the first count of this complaint." This count is faulty for assuming instead of alleging that defendant's servant slackened the speed of the car upon being informed that plaintiff desired to alight from it. It should also have alleged that it was the servant's duty to decrease the speed then and there. But the demurrer does not point out these omissions, if indeed they be material. The objection which was taken by the demurrer, we do not think tenable. The count does allege that the servant did negligently, greatly and suddenly increase the speed, that he owed plaintiff the duty to re-

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frain from so increasing it, and that this negligent violation of this duty caused plaintiff's fall and injury. Under the rule which obtains in this court in this class of cases and admits of the most general averments of causal negligence—"little if at all short of mere conclusions"—we must hold the averments good.

The 5th count after stating plaintiff's relation of passenger to defendant, etc., etc., and the duty of the servant to plaintiff not to increase the speed of the car after being advised that plaintiff desired the car stopped that he might alight, etc., etc., proceeds as follows: "Plaintiff says that the said motorman, the defendant well knowing that plaintiff was seeking to alight and well knowing that a sudden jerk would probably throw plaintiff from the car with wanton, willful or reckless negligence, suddenly increased the speed of said car and as a proximate consequence thereof" plaintiff was thrown from the car, etc., and injured, etc., etc. The thing here alleged that would and that defendant knew would probably cause plaintiff to fall is a "sudden jerk" of the car. It was not alleged that the motorman caused a sudden jerk of the car. The averment is that he "suddenly increased the speed of the car." A sudden increase of speed may cause a sudden jerk of the car or it may not; it depends upon the degree of sudden increase. Any increase of speed is necessarily sudden in a sense: it is a thing of the instant; but it does not imply such violent and immediate great increase as *jerks* the car. So that this count, especially when construed most strongly against the pleader, does not aver that the motorman willfully, wantonly or recklessly did the thing which to his knowledge would probably cause plaintiff to fall, but to the contrary, that he did a thing, which so far as the count shows, he had no reason to believe would injure the plaintiff. The count does not in terms aver that the motorman wantonly, willfully or recklessly caused plaintiff's fall, and that conclusion cannot be reached from his willfully, wantonly or recklessly doing an act that was not likely or to his knowledge liable to produce that result. Hence we conclude that this count does not

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present a charge of willful or wanton injury, but of a merely negligent injury; and it follows that the pleas of contributory negligence answered this as well as the other counts, and the demurrer to them, which proceeded on the ground that contributory negligence was no defense to the 5th count, etc., should have been overruled. The count is also inapt if not affirmatively bad as one for willful injury inflicted by the motorman, for that it, in fact, avers—though we have assumed the contrary in the foregoing discussion—not that he, the motorman, had knowledge of the probable disastrous consequences of his act, but that the *defendant* had such knowledge. The knowledge of the defendant in its corporate capacity or by some other servant than the motorman cannot thus be made to characterize as willful, and the like, an act on the part of the motorman which is not willful, or the like, in the absence of knowledge by him.

For the plaintiff to have stepped off the car while it was going at the rate of speed some of the evidence tends to show it was going, and in the manner some of the evidence tends to show he did step off, i. e., by walking off backwards, or, as other evidence tends to show, with his face towards the rear of the car, would have been negligence as a matter of law. Charge 5 should therefore, have not been given for the plaintiff.

We find no error in the other rulings of the court on request for instructions.

It is unnecessary to consider the motion for a new trial.

Reversed and remanded.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

[Rarden *et al.* v. Badham.]**Rarden *et al.* v. Badham.*****Bill in Equity to Enjoin Suit and Rescind Contract of Sale.***

1. *Contract of sale; right of rescision.*—Where by the fraudulent representation of a vendor in relation to material facts concerning the title of land, the falsity of which he has not the means of ascertaining and could not ascertain by reasonable diligence, one is induced to invest his money in the purchase of land, the purchaser can by bill in equity rescind the sale, and have the contract of purchase annulled.
2. *Same; same.*—If the vendor of lands falsely represents his title to be good, when it is not, and the purchaser relying on such representation, is thereby induced to enter into a contract to purchase said land, such misrepresentation, though made under an honest mistake as to the sufficiency of the title, entitles the purchaser to have the contract rescinded.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. JOHN C. CARMICHAEL.

The bill in this case was filed by the appellant against the appellee. In addition to the facts stated in the opinion, the bill further states that the defendant, Badham, has commenced suit against the complainants in the city court of Bessemer on one of said purchase money notes and has commenced suit in the circuit court of Jefferson county to enforce the collection of another of said purchase money notes.

The bill prayed for a temporary writ of injunction restraining the further prosecution of these suits instituted by Badham and prayed that the contract between complainants and Badham be rescinded and annulled, and that on final hearing said injunction be made perpetual. On this bill a temporary injunction was granted by the chancellor as prayed for in the bill.

The other facts of the case are sufficiently stated in the opinion. Upon the final submission of the cause on the Vol. 142.

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pleadings and proof the chancellor rendered a decree denying the relief prayed for, and ordering the bill dismissed. From this decree the complainants appeal and assign the rendition thereof as error.

PINCKNEY SCOTT, for appellants.—Cited *Crown v. Carriger*, 66 Ala. 590; *Munroe v. Pritchett*, 16 Ala. 789; *Moore v. Williams*, 12 Am. St. Rep. 847; *Foster v. Gressett's Heirs*, 29 Ala. 395; *Bryant v. Booth*, 30 Ala. 315; *Baptiste v. Peters*, 51 Ala. 158; *Orendorff v. Tallman*, 90 Ala. 441; *Griel v. Lomax*, 86 Ala. 132.

WALKER PERCY, *contra*.—Cited *Young v. Harris Admr.*, 2 Ala. 108; *Clements v. Loggins*, 2 Ala. 518; *LeBron v. Morris & Co.*, 110 Ala. 128; *Pate v. McConnell*, 106 Ala. 449; *Hunter v. O'Neal*, 12 Ala. 38.

HARALSON, J.—The bill states that on the 10th of January, 1903, the complainants entered into a written contract with defendant, whereby complainants were to purchase from defendant the property in Bessemer known as the "Grand Hotel," together with all its contents, at and for the sum of \$35,000.00, by paying \$5.00 in cash, and the balance in monthly installments of \$400.00 each, except the last two payments, one for \$95.00, and the other for \$100.00; that defendant represented that he owned said hotel and its contents, as described in a contract exhibited to the bill, and marked A; that relying upon the statements of defendant, complainants were induced to execute said contract, to pay the \$5.00 and execute their notes as provided therein.

They further state, that respondent falsely represented to complainants, that he was the owner of said property and had the right to convey the same; that the title to the property was vested in him, at the time complainants entered into and executed said contract and notes, and paid the sum of five dollars, and that they relied entirely on said statements of defendant and were induced thereby to purchase said property, to execute said agreement marked Exhibit A and their said notes, and to pay said sum of five dollars; that defendant well knowing that

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the title to said property was not vested in him but in the Charleston Savings Institution, or some other person, fraudulently withheld such information from complainants, who were thereby induced to execute and enter into said contract pay the said sum of money and execute their said notes.

The answer denies all the averments of the bill, as to false representations and deceit as to title.

On pleadings and evidence, the chancellor rendered a final decree, denying the relief prayed and dismissed the bill.

The well settled principles of law governing the decision of the cause are, that "Where one by the fraudulent representations of another, in relation to material facts concerning the title to land, the falsehood of which he had not the means of ascertaining, and could not have ascertained by reasonable diligence, is induced to invest his money in the purchase of land, he can have relief in chancery, (even) before an eviction, and without abandoning possession.—*Meeks v. Garner*, 93 Ala. 20; *Younge v. Harris*, 2 Ala. 111.

"It is generally held that, in order to render a party liable, he must have been guilty of active concealment, made false assertions by word or action, or prevented inquiry on the part of the vendee, in short his conduct must have been active and not merely passive."—28 Am. & Eng. Ency. Law, (1st ed.) 113; *Bryant v. Boothe*, 30 Ala. 311.

"Want of notice of a fact which is the result of a want of that diligence which the law requires for its ascertainment furnishes no ground for protection."—*Chapman v. Glassell*, 13 Ala. 55.

"A purchaser has the right to call and examine the claim of title to the land he is about to purchase, and if he neglects to do this, and purchases without seeing the deeds, through which he is to receive title, it is his own folly; in the language of the authorities, it is *crassa negligentia*, and he cannot protect himself from the consequences of notice, by insisting upon his own folly and neglect."—*Johnson v. Thweatt*, 18 Ala. 741; *Witter v.*

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Dudley, 42 Ala. 616; *Bunkley v. Lynch*, 47 Ala. 216; *Sanders v. Robertson*, 57 Ala. 465; *Blanks v. Walker*, 54 Ala. 117.

The foregoing principle is consistent with that other, that "if the vendor of land falsely represents his title to be good, when it is not; and the purchaser relying on the representation, is thereby induced to enter into the contract,—such misrepresentation though made under an honest mistake as to the sufficiency of the title, entitles the purchaser to have the contract rescinded." *Bailey v. Jordan*, 32 Ala. 50; *Crown v. Carriger*, 66 Ala. 592.

The evidence for the plaintiffs showed, that G. W. Stevenson, as agent for defendant, made the sale to complainants for the defendant, J. W. Rarden, one of the complainants testified, that Stevenson said that he was selling the property for defendant who owned it, and afterwards, complainants, defendant and Stevenson met, to complete the sale, at which time Mr. Fullenwider was also present; that at the time the contract was entered into, the defendant stated that he was the owner of the property and had the right to convey it; that no one showed witness an abstract of title, by which it appeared that defendant owned the property, nor did he show witness any contract existing between himself and any one else in reference to the title to the property.

On the cross-examination he testified, "Both Mr. Badham and Mr. Stevenson said that Mr. Badham had a right to sell the property, but I don't remember the specific words they used. I do not know that Mr. Badham said he had a right to sell it. A man has a right to sell any thing he owns. I didn't see an abstract of title before closing the trade * * * I just thought he owned it." He also stated, that he had no recollection of defendant telling him that the contract was similar to the one he had for the purchase of the property; that he thought the deed was in defendant, and had no other thought but that he had a deed; that he did not remember his using the words, that he owned the property, but his conversation led to that point, and he never thought to question his ownership. He also testified that if he

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had known that defendant was holding the property under a similar contract to the one he had made with complainants, he would not have bought it.

Burgin testified, that if he had heard any thing from defendant or any one else as to the title to the property being in any one else except defendant, he would not have signed the contract; that there was nothing stated in the final conference with defendant about the Charleston Savings Institute; that he heard the title was not in Badham, a few days after the contract was signed, and the contract was made upon the representations of Stevenson and defendant that the latter owned the property. He admits that he does not remember the exact language used, but that he understood from the conversation with defendant and Stevenson, that the title to the property was in defendant.

Attached to the deposition of one of complainants, is an abstract of title to the property in question, introduced for the purpose of showing that the record title to the property, at the time of the sale was in the Charleston Savings Institute.

George H. Stevenson for the defendant, testified that he understood, at the time of the trade, that it was the property of defendant, whom he was representing, but that the title to the property was not brought up; that an abstract of its title was handed around, and as he thought, was looked at by all; that the defendant was not there in the beginning, but was there, after the trade had progressed some, and he was certain Burgin, one of the complainants, overlooked the abstract; that the contract was read over to complainants and they seemed to be satisfied with it; that defendant stated, that he had not had an attorney to draw it up. but that it was simply a copy of the one he had, from the Charleston Savings Institute, and further than this, he did not remember that defendant said any thing about the title to the property.

Fullenwider testified that defendant, on being introduced to complainants, handed them a copy of the agreement which they both carefully read, and stated that it

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was prepared by a good lawyer and was the same that then existed between him and the Charleston Savings Institute; that he would require them to insure the property for \$10 000.00, the same amount that the Charleston Savings Institute required him to carry, and that nothing was said beyond this about his title, and no questions were asked about it.

The defendant testified in substance to the same effect, —that he bought the property in May, 1902, from the Charleston Savings Institute for \$25,000.00, paying \$1,000.00 in cash, and giving his notes for \$400.00, payable monthly, for the balance, which notes he had regularly paid each month, and is amply able to pay the remainder of his notes as they mature; that he is ready and able upon payment in full by complainants of their said notes, to convey a good title to the property to them, and was willing, if the court deemed it proper, to execute a bond in amount to be fixed by the court with good and sufficient sureties to secure the execution of a good and valid title to the property in question to complainants, upon the payment by them in full of the purchase money. In its final decree, the court prescribed a bond in the sum of \$15,000.00 to be approved by the register, payable to complainants, conditioned to execute to them a title in fee simple free of all incumbrances and with covenants of warranty in accordance with his contract with them, which bond was to be executed within thirty days, and upon its execution the bill was to be dismissed. This bond was executed as prescribed, and upon motion of defendant, the bill was dismissed.

The execution of this bond shows, at least, the good faith of defendant in his contract making sale of the property to complainants, of his ability to carry it out, and the absence of fraud in its execution. The evidence is reasonably satisfactory, that defendant did not falsely represent to the complainants that he was the owner of the property, and that he had a right to convey the same to them, as is alleged in the bill. Nor does it appear that defendant made any willful and misleading representations to them, to induce complainants to purchase the property. If they did not acquire full notice

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and information as to the status of the title of the property, it was their own fault, and did not come from any fraud or misrepresentation of defendant. They had ample and unobstructed opportunity to do so.

The decree of the court below is affirmed.

Affirmed.

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

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Bill by Sub-Contractor to Subject Money Due the Contractor from the Owner.

1. Statutory notice of subcontractor to owner; what money subject.

The owner of a building who advances a contractor on a contract after having received the statutory notice from a subcontractor or material man who has furnished labor or material, is liable to said sub-contractor for such amounts advanced; notwithstanding the amount advanced was to pay for material necessary for the completion of the building.

2. Same; unpaid balance.—A material man or sub-contractor, who gives notice to the owner of his claim, has a lien upon the unpaid balance due the contractor and upon whatever sum may subsequently become due under the contract.

3. Same; same.—The fact that there was held by the owner a sufficient amount under the contract due the contractor after the completion of the building to satisfy the claim of the said contractor, had it not been for the intervention of other lienors, does not excuse the owner from said liability.

APPEAL from Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

The original bill in this case was filed by Stern & Marks, against the Mobile Lodge, No. 108, Benevolent and Protective Order of Elks, The D. J. McDonald

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Stone Company, S. D. Copeland and Zachary & Zachary and it is alleged in said bill that said Benevolent Order of Elks as owners, had contracted with Zachary & Zachary as contractors, to erect a certain building furnishing material for same on certain premises in the City of Mobile for a stipulated amount. It is further alleged in said bill that the complainant had furnished material and set up said material under a contract with Zachary & Zachary, the original contractors, and had been paid only in part for same and that they had given notice of their lien to the owner, the Benevolent Order of Elks, and that there remained a balance due from said owner in amount \$1,231.45 on said contract to Zachary & Zachary, and it is further alleged in said bill that the D. J. McDonald Stone Company and S. D. Copeland had filed mechanics and materialmen's liens for certain amounts similar to complainant. All of said respondents filed separate cross bills and answers, setting up substantially the same as alleged in the original bill, except the D. J. McDonald Stone Company alleged that at the time it gave its first notice of its sub-contractor's lien to the owner Benevolent Order of Elks, there remained a balance of about \$2,500.00 due upon the contract price to which on the completion of the building, contractors would become entitled; and the respondent Mobile Lodge No. 108, Benevolent Protective Order of Elks, set up also in its answer that "at the date upon which the said D. J. McDonald Stone Company gave notice unto the said Lodge that the said Stone Company claimed a lien on the building and lot described in the original bill, the amount and value of the materials and labor necessary to be placed in and upon said building to furnish and complete the same under the contract with said Zachary & Zachary for its erection exceeded \$1,300.00.

And to the Elks cross bill the McDonald Stone Company demurred on the ground that the cross bill shows that money due or to become due on the contract to Zachary & Zachary after the said Stone Company's notice of lien had been given and that the said cross complainant had not elected to declare the contract with Zachary & Zachary forfeited. All of said demurrers

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were overruled by the Chancellor to which ruling the said Stone Company duly excepted.

The facts in the case are all agreed upon and was substantially as alleged in the bill, the cross bills and the answers. The court decreed that each of said lienors were entitled to a *pro rata* share of the balance then in the hands of the owner admitted to be due the contractor. From the rendition of such decree the McDonald Stone Company appeals and assigns the same as error.

GREGORY L. & H. T. SMITH, for appellant.—Cited *Adamson v. Phaner*, 29 N. E. 944; *Wheeler v. Scofield*, 67 N. Y. 314; Section 2723 Code of 1896.

To allow the owner of a building to pay money to a contractor to enable or induce him to carry out the contract, after a notice of a lien was served on said owner would have a tendency to abolish the statute. *Hickman v. Pinkney*, 81 N. Y. 211; *Armstrong v. Tabor*, 12 Pac. 157.

PILLANS, HANAW & PILLANS, *contra*.—If at the time the sub-contractors lien is filed, the building is incomplete, the amount of money necessary to pay for the material to complete the same is not, and will not, become due the contractors.—Sec. 2723, *Green v. Robinson*, 110 Ala. 503; *Mobile St. Ry. Co. v. Turner*, 91 Ala. 213; *Phillips Mec. Liens* Sec. 292; Sec. 2734 Code of Ala. 1896.

Only the balance due the contractor after the completion of the building was subject to lien of sub-contractor, Code § 2745; *Lee v. Wimberly*, 102 Ala. 539.

TYSON, J.—It appears from the cross-bill of the owner, The Mobile Lodge No. 108 Benevolent and Protective Order of Elks, to which the demurrer was interposed by The D. J. McDonald Stone Company, that after the McDonald Company had given the owner notice that it claimed a lien as a sub-contractor for the labor and materials furnished the contractor as required by § 2731 of the Code, that the owner advanced to the contractor, as a part of the contract price, a sum of money

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more than enough to pay off and discharge the claim of The McDonald Company. This money was advanced, it is alleged, to pay for necessary materials and labor to complete the building which the contractor, under the contract, was bound to furnish and was so appropriated.

After this advance was made, other material men and subcontractors gave notice that they claimed liens, but the amount which became due to the contractor, by reason of the advance to him was wholly insufficient to pay all the lienors.

It is not averred in the cross-bill that the contract contained stipulations authorizing the advance of the money to the contractor. The point made by the demurrer is that The McDonald Stone Company had a lien upon the money paid or advanced to the contractor.

It is first contended by counsel for the Mobile Lodge, the owner, that under the facts alleged, it had the right to make the payment or advancement because there was, *at the time of the service of the notice*, nothing due the contractor—no such sum was *then* due to him payable presently or in the future for the reason that he had not then earned it by completing the building. This contention, if we understand it correctly, is predicated upon the proposition that the statutes only give a lien to material men and subcontractors upon any unpaid balance due the contractor by the owner at the time of the service of the notice.

The logic of this contention would lead to the result that if on the day the notice is served there be nothing actually due the contractor, but on the next day or the next week thereafter, there becomes due to him on the contract a sum of money, the material men or subcontractor would have no lien upon it as an unpaid balance and could not subject it.

In the recent case of *Alabama & Georgia Lumber Company v. Tisdale*, 139 Ala. 250, we passed upon this question. In that case Tisdale, the owner, after notice that plaintiff claimed a lien, made a payment to the contractor. We held that he was liable, and among other things said that "the unpaid balance as used in the statutes means any sum of money which is due when the notice

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is given or that may subsequently become due under the contract to the contractor." Indeed, that case is decisive of the question here under consideration, unless it can be said that there is a difference between a payment and an advance to the contractor.

That what was there said is the correct construction of the statutes we need, it seems to us, only quote that provision of § 2731 of the Code, providing for notice to the owner, which is in this language, viz; "after such notice, any unpaid balance in the hands of the owner or proprietor shall be held subject to such lien." But it may be said that *Greene v. Robinson*, 110 Ala. 507, is opposed to this conclusion. Indeed, that case seems to be relied on as supporting the contention here made. It is true the opinion contains the statement that "the law is very clear that it is only the unpaid balance in the hands of the owner or proprietor at the time of notice to him, that can be made subject to plaintiff's claim and for which a lien can be enforced."

But the question here presented and the one presented in *Alabama & Georgia Lumber Company v. Tisdale*, were not involved in that case, *as will* be readily seen by a reference to the facts and the exception reserved to the ruling of the trial court brought here for review. In that case the plaintiff's notice was given on the 19th day of November, 1894. On the trial the defendant, owner, offered to prove by the contractor that he owed him nothing on account of the contract after the 16th day of November, 1904. The court refused to permit this to be done. And this was the question that this court was called upon to decide and it was with respect to that question that the language quoted above was employed.

The McDonald Company having a lien, under the statutes, upon any unpaid balance that may become due under the contract to the contractor, could the owner defeat or impair that lien by advancing money upon the

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contract to the contractor, without the consent of the lienor and when the contract makes no provision for it? This question must be answered in the negative unless there is some provision to be found in the statutes which authorizes the owner to make such an advance. For clearly, in the absence of some statutory provision, if the contractor ever earned this money by the performance of the contract, which the cross-bill shows he did, there is no way by which it could be discharged of the lien except by the consent of the lienor. To hold otherwise would render it impossible to enforce the statute. Indeed, to permit an owner to advance to a contractor a part of the contract price and to thus defeat the lien of a material man or subcontractor, would confer upon them the power, in every instance, to destroy the purposes of the statutes. If payment may be anticipated and liens destroyed in this way, the statutes may as well be abolished. Where the contractor goes forward with performance under the contract, as here, an advancement of a part of the contract price amounts to no more than a payment to him on account of that performance and can have no greater effect upon the rights of a lienor than a payment to him after he has earned it? In this respect the case does not differ from that of a person upon whom a garnishment is served against the estate of another with whom he may have a contract. Unquestionably, if the party with whom the garnishee has a contract, declines further performance he may set-off against his liability the cost of completing the work, but if the original contractor performs the contract, the garnishee could not escape liability for the full amount of the money which he had advanced or paid after the service of the writ of garnishment. And the mere fact that he might have been damaged by reason of the failure of the defendant to perform his contract, and, therefore, it was desirable to keep the contractor at work, cannot affect the lien created and acquired by the service of the writ.

The case of *Mobile Street Railway v. Turner*, 491 Ala. 213, is relied upon as establishing the right of the owner

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in this case to make the payment to the contractor under the circumstances averred in the cross-bill.

In that case, which was a garnishment, the contract contained an express stipulation conferring upon the owner the right to provide, (upon a certain contingency which the uncontradicted answer of the garnishee disclosed had arisen) at the expense of the contractor, all materials and labor necessary to a completion of the building, which expense was to be deducted from the contract price to be paid the contractor. It clearly has no application here.

But it is insisted that the owner was justified in paying this money, although The McDonald Company had a lien upon it, because after its payment there would have become due, upon the completion of the building, to the contractor, a sufficient sum to have paid The McDonald Company's claim, had not it been for the intervention of other lienors.

There is no pretense that The McDonald Company did any thing which induced the payment here sought to be justified. Its justification is predicated upon § 2744 of the Code. To see that this section does not support the contention, we need only quote it: It reads as follows: "When the lien is sought to be enforced by any person other than the contractor, it shall be the duty of the contractor to defend the suit at his own expense; and after notice of an intention to file a statement of the lien, and pending the suit, the owner or proprietor may withhold from the contractor money sufficient to cover the amount claimed, and the probable cost and expense of suit; and in case of recovery against the owner or proprietor, or his property, he shall be entitled to deduct from the amount owing by him to the contractor the amount of such judgment, costs and expense; and if he shall have settled with the contractor, he shall be entitled to recover from the contractor the amount recovered of, and paid by him; and such recovery may be had in the same court, on motion, on three days' notice."

The demurrer to the cross-bill should have been sustained, instead of being overruled.

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In conclusion it may be well to say for the guidance of the chancellor on a final hearing that, upon the evidence adduced, the balance now in the hands of the owner admitted to be due the contractor, should be *pro rated* among the several lienors, and after deducting the sum *pro rata* to The McDonald Company from the amount found to be due to that company, it will be entitled to have a lien declared upon the property of the owner in its favor for the unpaid balance of its claim. All the lienors have a lien upon the balance admitted to be due the contractor, but none of them except the McDonald Company are effected by the advancement or pre-payment made to the contractor. This advancement or pre-payment was good against all except The McDonald Company because made in good faith before notice of their liens were given. As to that company the advancement or pre-payment being unwarranted the owner must be regarded as still owing to the contractor at least so much of the amount advanced as will satisfy the balance that may be found due by the contractor to The McDonald Company after allowing a credit for whatever sum may be *pro rated* to it out of the money on hand.

The decree overruling the demurrer to the cross-bill will be reversed and one will be here rendered sustaining it.

Reversed and rendered.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

[Romano v. Brooks.]

Romano v. Brooks.*Action for Deceit in the Sale of Merchandise.*

- 1 *Pleading; counts ex delicto and ex contractu cannot be joined in the same complaint.*—A count for deceit in the sale of merchandise cannot be joined with a count for the breach of a contract of sale.
2. *Agency; what facts sufficient to authorize the inference of agency.*—Proof that an alleged agent sold merchandise and that thereafter without any communication between the purchaser and the alleged principal the merchandise was shipped by the alleged principal to the purchaser, while not sufficient to justify a witness in testifying as a matter of fact that the alleged agent was the agent of the principal, is sufficient to permit the inference by a court or jury that the alleged agent was the agent of the alleged principal and was acting as such in the transaction, and therefore in a suit to recover for deceit practiced in the sale of said merchandise it is error to exclude the representations of such agent made to the purchaser as to the quality of the merchandise so sold.

APPEAL from Bessemer City Court (Law.)

Tried before the Hon. W. F. PORTER, Special Judge.

This was an action for deceit in the sale of a car-load of oats made by the defendant's agent to the plaintiff's agent, to which was also joined a count for breach of the contract of sale. In the first count of the complaint the plaintiff claimed of the defendant "the sum of \$60.00 for deceit in the sale of one car load of oats which the defendant at the time of the sale represented to be Standard Texas Rust proof oats and sound, and which at the time of the sale defendant knew not to be the quality represented, and also to be unsound."

In the third count of the complaint as amended the plaintiff claimed of the defendant "the sum of \$60.00 damages for breach of a contract in this, that on or about the 1st day of September, the defendant for a

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valuable consideration agreed to sell and deliver to plaintiff in Bessemer, Alabama, one car-load of sound Texas Rust proof oats, and plaintiff relying on the agreement paid to the defendant the consideration he agreed to pay him for the kind of oats he had bought, but defendant breached the contract in this, to-wit:

First. Because the oats delivered to the plaintiff was not the Texas Standard Rust proof.

Second. Because the oats delivered to the plaintiff was unsound.

And plaintiff avers that as a result of the breaching of the contract aforesaid he was damaged in the sum aforesaid, hence this suit."

The other facts sufficient for an understanding of this case are stated in the opinion.

TROTTER & O'DELL, for appellant.—Cited Benjamin on Sales, volume 2, 6 Am. Edition pages 824 to 828; Storey on Agency, 7 Edition, Sections 134 to 139; *Gachet v. Warren*, 73 Ala. 288; *Gaines v. McKinley*, 1 Ala. 446; *Bradford v. Bush*, 10 Ala. 386; *Cocke v. Campbell*, 13 Ala. 286; *Herring v. Scraggs*, 62 Ala. 180; *Englehardt v. Clanton*, 83 Ala. 836; *Dixon v. Barkley*, 22 Ala. 370; Ency. of Pleading & Practice, volume 8, page 910; Ency. of Pleading & Practice volume 4, pages 754 and 915.

J. A. ESTES and W. K. SMITH, *contra*.

DOWDELL, J.—One of the grounds of demurrer which the trial court sustained to the complaint, was for a misjoinder of causes of action. The first count, which claimed damages for deceit in the sale of a car load of oats was in case, while the third count, both as originally filed and as amended, counted on a breach of contract in the sale. This constituted a misjoinder of causes of action that made the complaint subject to the demurrer interposed and the court so properly ruled. The cause was then tried, as the judgment recites, on the first and second counts, by the court without a jury. The first count, as above stated, was for deceit in the sale of the oats; the second count was for breach of warranty

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in the sale. To these counts the general issue was pleaded.

Sam Romano, the brother of the plaintiff testified, that he, acting for the plaintiff, purchased the car load of oats in question from one Guinn, who, plaintiff claimed, acted as the agent of the defendant in the sale. The plaintiff sought to show by this witness the representation made by the said Guinn in the sale, to which the defendant objected until the agency of Guinn, and his authority as such agent to bind the plaintiff, was first shown. Against this objection, but with the understanding, however, that unless the plaintiff should show the agency of Guinn, the same was to be subsequently ruled out, the witness was permitted to testify that Guinn represented the oats to be Texas Standard Rust-Proof oats and sound, and further, that the oats turned out not to be standard rust-proof oats and were unsound. This witness further testified that Guinn was the agent of defendant, but on his cross examination, it was shown that this was only the conclusion of the witness, for when asked how he knew that Guinn was the agent of Brooks, he answered, "Because I bought them from Guinn, and they were shipped direct from Brooks." It was not permissible for the witness on this evidence, to state as a fact that Guinn was the agent of Brooks. The oats were as the testimony of this witness showed, billed and shipped direct to the plaintiff, and a draft drawn with the bill of lading attached. One other witness, Rarden, testified to having purchased oats the same year from the defendant, but could not say that he purchased through an agent, though probably he may have bought through Guinn. On motion of the defendant, the court excluded all the evidence of the agency of Guinn, and all evidence as to the representations made by him, and rendered judgment in favor of the defendant.

The evidence being that the plaintiff bought the oats from Guinn, and that Brooks shipped the oats to plaintiff with draft for the agreed purchase price attached to bill of lading, it was open to the inference that Guinn was acting as the agent of Brooks in the sale of the oats,

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and this being true, it was erroneous to exclude the evidence as to the representations made by Guinn. With this evidence in as to the representations made by Guinn, we cannot affirm that the trial court would have rendered a judgment in favor of the plaintiff. Under the principle laid down in *First National Bank v. Chaffin, et al.*, 118 Ala. 246, the exclusion of the evidence as to the representations made by Guinn constitutes error for which the judgment of the trial court, although the case was tried without a jury, must be reversed.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and TYSON, J.J., concurring.

Humphries v. Adkins *et al.*

Bill in Equity to Enjoin Ejectment Suit.

1. *Equitable relief; defendant at law not barred after judgment rendered; laches.*—A defendant in a suit at law having only a purely equitable defense to the cause of action stated in the complaint, is not barred of his equity by the mere fact that he waits to file his bill until judgment has been entered against him in the suit at law, and such delay in asking for relief in a court of equity does not constitute laches.—*Hooper v. Birchfield*, 138 Ala. 423, overruled.

APPEAL from the City Court of Anniston in Equity.

Heard before the Hon. THOMAS W. COLEMAN, JR.

The facts essential to an understanding of the decision on this appeal may be summarized as follows: Manuel Adkins, father of appellees, died about the 31st of May, 1902, seized and possessed of the lands which are involved in this litigation. Adkins left a will, or a document purporting to be a will, in which one T. R. Sparks, was named as executor. The will was attacked by David and Josie Adkins, appellees, and was by the honorable city court of Anniston, on to-wit, the 27th day of February,

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1904, decreed to be null and void and of no effect, and the probate of said alleged will, and the proceedings had thereunder, were set aside, cancelled and annulled, held for naught. Prior to this adjudication by the learned court, however, said Sparks applied for the probate of the alleged will and obtained letters testamentary as the executor of the last will and testament of Manuel Adkins. On the 29th of September, 1903, said Sparks, as executor, filed a petition in the probate court of Calhoun county, praying for a decree of sale of the property for division and payment of debts. The petition of said Sparks was granted on November 2nd, 1903, and on the 18th day of January Sparks sold the real estate involved in this suit to J. H. Humphries, appellant here. On the 20th day of January, 1904, Sparks reported the sale to the probate court, and on the 30th of the same month the sale was confirmed and a deed was made to appellant by said Sparks, as executor. On the 7th day of March, 1904, an ejectment suit was instituted by appellees against appellant for the lands, and on the 23rd of June, 1904, a judgment was obtained by them awarding them the lands. After the recovery of this judgment, the defendant in ejectment suit, J. H. Humphries, filed a bill in the present case, averring the facts as above set forth, and prayed for an injunction restraining the plaintiff in the ejectment suit from further prosecution of said suit, and from the enforcement of the judgment against the complainant for the possession of said premises, and that upon a final hearing said injunction be made perpetual.

Upon the filing of the bill a temporary injunction was issued. The defendants demurred to the bill setting up in various ways the ground that the complainant waited too long before filing the present suit, in that he had allowed the ejectment suit to proceed to judgment without application for equitable intervention. The defendant also moved to dismiss the bill for the want of equity, and further moved to dissolve the injunction for the want of equity in the bill, and because he had waited until after the rendition of the judgment to ask for equitable

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relief. On the submission of the cause upon the motions and the demurrer, the chancellor rendered a decree holding that the bill was without equity, and sustained the motion to dismiss the bill and to dissolve the injunction. From this decree the complainant appeals, and assigns the rendition thereof as error.

BLACKWELL & AGEE, for appellant.—A court of equity will grant relief by injunction to a complainant who had an equitable defense to an action at law, but could not interpose the same on account of its being equitable in its nature.—*Calloway v. McElroy*, 3 Ala. 406; *Nelson v. Dunn*, 15 Ala. 514; *Howell v. Motes*, 54 Ala. 1; *Morgan v. Lehman Durr*, 92 Ala. 442; *Johnson v. Christian*, 128 U. S. 374-381-2; *Crim v. Handley*, 94 U. S. 652; High on Injunctions, Sec. 86; 1 High on Injunctions, 2nd Ed. 87; *Hubbard v. Easmon*, 93 Am. Dec. 467; *Jarratt v. Goodnow*, 32 L. R. A., 321 note.

MCCARTY & MERRILL, *contra*.—Conceding that appellant has an equitable title, yet having had knowledge of it pending the final settlement of the ejectment suit, to which he was a party and actually resisted, it is too late for him to come in now seeking equitable relief. The Alabama authorities are thoroughly committed to the proposition that a party having an equitable defense when an action at law is pending against him must go into equity before the conclusion of the action at law, if he has knowledge of his equitable remedy. He cannot sit down and speculate upon the results in the action at law, accumulating costs and protracting the litigation, and then come into equity and ask relief of that forum. *Hooper & Nolan v. Birchfield*, 138 Ala. 423; *Moore v. Faggard*, 51 Ala. 525.

SIMPSON, J.—The motion to dissolve the injunction, and the decree sustaining said motion seemed to have been based on a remark in the case of *Hooper & Nolan v. Birchfield*, 138 Ala. 427, to the effect that "A defendant having equitable defenses to an action at law, of which he is at the time, apprised, should not wait until such suit has proceeded to such

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judgment, before applying to a court of equity for relief by injunction." This remark was not necessary to the decision of that case, and to that extent the case is overruled.

This question had previously received careful consideration by this court, and it was held that "a defendant in a suit at law having only a purely equitable defense * * * is not barred of his equity by the mere fact that he defers filing his bill until judgment has been entered against him at law."—*Sternes v. Hartzler*, 114 Ala. 564.

The judgment of the court is reversed and the cause remanded.

MCCLELLAN, C. J., TYSON, DOWDELL, ANDERSON and DENSON, J. J.

Mobile Land Improvement Co. v. Gass.

Bill in Equity to have Annulled Deeds of a Corporation.

1. *Corporation; relation of director and officer; when deed set aside.*—Where a director and officer of a corporation, in disregard and breach of his fiduciary relation, secures the corporate authorities to convey to him property of the corporation, such transaction is voidable, and the corporation can maintain a bill in its own name to have the deed conveying the property set aside and annulled.
2. *Same; same; same.*—Where one who is a director and secretary and treasurer of a corporation, at a meeting of the directors of said corporation in which it was necessary for such person to participate to constitute a quorum, induces said meeting to authorize a conveyance of the corporate property to him, and his vote secured the passage of said resolution, the subsequent conveyance of the property by the corporate authorities in accordance with said resolution can be set aside and annulled by a bill being filed in equity for such purpose by the corporation itself.
3. *Equity pleading and practice; when relief can be given under general prayer.*—Where a bill in equity seeks to have certain conveyances cancelled and annulled upon the ground that they

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are absolutely void, and the averments of the bill and its prayer for specific relief are based upon such theory, but such bill also contains a prayer for general relief, if upon the averments and proof it is shown that the transaction while not void *ab initio* was voidable, and the complainant was entitled to have the conveyances annulled, the relief can be had under the general prayer.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon THOMAS H. SMITH.

This action was commenced by the Mobile Land Improvement Company by a bill in Chancery against H. R. Gass, and was subsequently amended as to make several parties, who purchased the land involved in this suit from him, defendants. The bill alleged that the complainant was a corporation under the laws of Alabama, and that the defendant Gass was the secretary and treasurer of the company and also a director from the 16th day of April, 1889, to the 30th day of April, 1900; that some of the directors of the company resided in Michigan, and some in Mobile, Alabama, and that the residences of the stockholders were similarly distributed; that on the 18th day of November, 1896, the board of directors held a meeting in Flint, Michigan, and adopted a resolution authorizing the president to transfer to the defendant, Gass, three parcels of land belonging to the corporation, each having a front of 50 feet on Michigan Avenue, upon condition that he erect upon each parcel of land a two-story dwelling house to cost at a fair value not less than two thousand dollars, and that no deed should be given him until he had begun the erection of a house on the land covered by it. It alleges that the resolution as spread upon the minutes, however, purported to grant five parcels with frontage of 100 ft. each instead of three lots of land. The bill alleges that there was present at said meeting F. A. Platt, M. P. Cook, I. W. Whitehead and the defendant, H. R. Gass, and that, except for the presence of said Gass there would not have been a quorum of the directors. It alleges that defendant took possession of the lands described in the resolution as spread upon the minutes, and proceeded to erect houses

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upon them with his own means; that when the bill of complaint was filed he had erected a house upon each of four of the parcels of land, but that each house only occupied a space of fifty feet on Michigan avenue; that all of the houses but one had been disposed of to other defendants for a valuable consideration and without notice, and that said Gass had never rendered any account to the company of the profits arising from the sale of the buildings or lots upon which they were erected. That Gass from time to time obtained deed executed by the company through F. A. Platt, its president, and himself as secretary of the company. The bill further alleges that the company had not complied with the provisions of law authorizing it to hold directors' meetings outside of the state and that in April, 1900, the stockholders had repudiated the transaction, and had demanded the cancellation and surrender of the conveyances made to Gass.

The bill prays that the defendant, H. R. Gass, be required to surrender the deeds made to him into the registry of the court to be cancelled, but that, by its decree, the court protect the title of the other defendants who purchased three of the lots in controversy, and for general relief.

The bill attaches copies of each of the four conveyances as exhibits. Each of these conveyances recites that "Whereas the board of directors of the Mobile Land Improvement Company did, at a meeting in the City of Mobile, on to-wit the 16th day of February, 1891, adopt the following resolution, viz.: 'Be it resolved, that the lands of this company shall be sold as opportunity may afford at prices satisfactory to the president or vice-president and secretary of the company, and said officers are authorized to make deed to purchasers in such form and with such conditions and covenants respectively as they may deem proper.'" Each conveyance is executed under the corporate seal of the company.

Decree *pro confesso* was rendered against the defendants other than Gass, but the defendant Gass answered the bill admitting the corporate capacity of the company, and that it had power to purchase, own, improve,

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rent or sell real estate, or interest in real estate, to construct buildings upon real estate, and many other powers. He admitted that the appellant had purchased a large body of real estate, and had adopted a system of by-laws for the regulation and conduct of its affairs. He also admits the election of himself as secretary and treasurer and director of the company, and that he retained these offices down to the 30th day of April, 1900, and, further, that some of the directors resided in Michigan, and some in Mobile, Alabama. The defendant by way of pleas in his answer, sets up in detail a number of meetings of the board of directors held by the company in Michigan prior to the meeting of November 18, 1896, and the fact that many matters of importance to the company were authorized at such meetings, and, further shows that practically all of the important business of the company was conducted through meetings of the boards of directors held in Michigan, and that this was well-known to all of the stockholders of the company prior to November 18, 1896. He further attaches a map of the lands of the appellant, and shows that they were vacant lands without houses on them, and constituted an open, unfenced, uncultivated, plain without streets or avenues of any kind, and that complainant purchased this tract for the purpose of laying it off into city lots, and selling them as residences at a profit; that it had the lots plotted and advertised extensively for sale. That prior to November 18, 1896, the company had this land in the hands of several agents, and had been making strenuous efforts to sell as many of these lots as it could, but had failed to make any sales; that all of the stockholders thought it would greatly enhance the value of the property and facilitate the sale of said lots to get some one to build upon one or more of them, and reside there, believing this would induce others to purchase lots and build residences upon them, and thereby greatly enhance the value of the entire property. With this view the directors at a meeting in Flint, Michigan, in April, 1901, authorized their president to enter into negotiations with a Mr. King, Mr. Taylor and Mr. Posey, by which the company was to

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give them one lot each on Michigan Avenue, and to build a plank sidewalk in front thereof, and guarantee the extension of the water mains to the lots selected, if they would, within a specified time, put buildings on these lots to cost not less than twenty-five hundred dollars, and pay fifty dollars towards laying the water mains; that the company attempted to induce these parties to accept the lands upon these terms, but failed; that at a meeting held March 7, 1893, a committee that had been previously appointed, reported on the feasibility of a sale of 400 lots on the company's tract on Michigan Avenue, and recommended that three houses should be erected thereon at a cost of not less than eleven thousand dollars; that each purchaser was to obtain a lot without location, and that the location should then be determined by lot, so that three of the purchasers would obtain a house and lot by his purchase; that the sale was had, but the company did not succeed in selling any of the lots. On account of the long continued inability of the company to dispose of any of its property at what it deemed proper prices, or to get any residences constructed thereon, the matter of devising some method to facilitate the sale of lots became a constant subject of discussion among the stockholders, and sometime in 1895 the defendant suggested to some of the directors that to locate residences upon the property he would build, at his own expense and dispose of, to bona fide residents, five residences upon the property, if the company would give him ten lots, or their equivalents, in the tract, he to sell the houses without profit and to have the lots not built upon as compensation for his work and risk. This suggestion was considered by all of the directors who discussed it as the most feasible plan that could be suggested to increase the value of the company's property, but the suggestion was not carried out until 1896, at which time the proposition was accepted and a resolution passed giving him ten lots upon the terms set out in the bill of complaint; that the action of the board of directors in entering into the agreement was known to nearly all of the directors of the company and to many of the stockholders, and that

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the defendant spoke to a number of them himself about the matter. In the early part of 1897 he commenced the erection of a house upon one of these lots, and when it was completed he took photographs of it, and showed it to several members of the directory; he sent deeds to the president of the company for the parcel of land upon which this house was erected consisting of 100 foot front on Michigan Avenue, and after the deed was obtained he made efforts to sell this property at the actual cost to him of the building without any compensation for the lot, or for his time, trouble and risk in building and selling the property. He finally sold it to a prominent citizen of Mobile, who occupied it as his residence. As soon as he succeeded in disposing of this building, defendant commenced the erection of another building upon another of the parcels which the company had agreed to convey to him and obtained a deed for that parcel and when that building was completed, he took active steps to dispose of it without profit to himself, and succeeded in selling it to a prominent citizen who made it his home, and as soon as he did so, he immediately commenced the erection of still another building upon another of said parcels, and obtained a deed to that, and when it was completed took active steps to sell that building without profit to himself, and succeeded in selling it to a prominent citizen who made a residence of it, and he then commenced the erection of the fourth building upon another parcel, and obtained a conveyance of that, but, before he completed that building the bill of complaint in this case was filed. That each of said buildings was so situated that they could be seen by any person passing complainant's land, and so as to be seen by any person passing up and down the principal residence street in the City of Mobile. That each of said buildings cost the defendant between three thousand and four thousand dollars, and that the construction of said several buildings did enhance the value of the entire tract of land, nearly one hundred per cent. over what it would have been worth except for the construction of said buildings and the occupation thereof by citizens as residences. The answer sets up that subse-

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quent to that several meetings of the directors and of the stockholders were had without repudiating said transaction, but that finally it was resolved by the board of directors "that they repudiated and disaffirmed the transaction heretofore made with H. R. Gass, whereby certain property of the company was improperly conveyed to said Gass except as to such of said lots that have been sold by said Gass, and except as to lot 18, block 20. The attorney of the company is hereby instructed to commence proceedings for the recovery of said real property, if said Gass refuse, upon the written demand of the company to reconvey said property to the company." The defendant claims that under the facts set up in his answer the company has ratified the transaction made in the first instance, and that in addition thereto it has allowed itself to become estopped from repudiating the same. Several portions of the answer are made pleas to the bill of complaint.

Upon the submission of the cause for a hearing upon the sufficiency of the pleas, the Court rendered a decree sustaining said pleas. Upon the final submission of the cause upon the pleadings and proof, the Chancellor rendered a decree denying the relief prayed for, and ordering the bill dismissed. The complainant appealed, and assigned as error the interlocutory decree of the Chancellor holding the pleas sufficient and the rendition of the final decree denying the relief prayed for and dismissing the bill.

HENRY CHAMBERLAIN and McINTOSH & RICH, for appellant.—(No brief came to the hands of the reporter.)

GREGORY L. & H. T. SMITH, *contra*.—The fact that the director of a corporation participated in a meeting of the directors in which a contract was made by the corporation with himself does not vitiate the contract.—*Cory v. Wadsworth*, 118 Ala. 488; *Anderson v Bullock County Bank*, 122 Ala. 288

A corporation may ratify unauthorized acts done in its name by its officers and estop itself from asserting relief upon the ground that the officers had no such authority.—*Bibb v. Hall & Farley*, 101 Ala. 95; *Mobile &*
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Montgomery Rwy Co. v. Gilmer, 85 Ala. 434; *Ala. Gt. Southern R. R. Co. v. South & North Ala. R. R. Co.*, 84 Ala. 570.

A ratification of part of an unauthorized act operates as a ratification of the whole.—*American Freehold Land & Mortgage Co. v. Dykes*, 111 Ala. 190; *Gaines v. Miller*, 111 U. S. 398; *Bingham v. Palmer*, 3 Allen 453; *Shoniger v. Peabody*, 17 Atl. 278; *Everts et al. v. Selover*, 7 N. W. 225; *Wheeler & Wilson Mfg. Co. v. Aughley*, 22 Atl. 667; *Taylor & Meyers v. Conner*, 41 Miss. 722.

A corporation that has obtained and retained the benefits of an unauthorized act is estopped from repudiating the act.—111 Amer. & Eng. Encyc. of Law, 478; 19th Vol. Century Dig., page 2351 §264; *Mobile & Montgomery Rwy. Co. v. Gilmer*, 85 Ala. 434; *Ala. Gt. Southern R. R. Co. v. South & North Railroad*, 84 Ala. 570.

ANDERSON, J.—While the deeds sought to be cancelled purport to have been authorized by a resolution passed at a meeting in Mobile in the year 1891, it is an undisputed fact, that they were made under and pursuant to a resolution of a bare quorum of directors, at a meeting held at Flint, Michigan in the year 1896. The evidence also discloses the fact, that at said meeting, the presence of and the participation therein by the respondent, Gass, was necessary to constitute a quorum and to give it legal vitality, and that the vote of Gass secured the passage of the resolution.

The directors of a corporation, are the trustees and managing partners, and the stockholders are the *cestui que trust*, and have a joint interest in all of the property and effects of the corporation.—*Robinson v. Smith*, 3 Paige, 222, 232; *Cunningham v. Pell*, 5 Ib. 607; *Slee v. Bloom*, 19 Johns 479.

“If this is the relation, then the rules of law applicable to purchasers by agents and trustees, apply to the purchase in question. There is a manifest impropriety in allowing the same person to act as the agent of the seller and to become himself the buyer. There may be, in all such cases, a conflict between the duty and interest. Acting for the best interests of the corporation, his

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disinterested and unbiased convictions of duty might be to advise against a sale of the entire property to one creditor, or against any sale at all. It is in view of these considerations that, 'the wise policy of the law hath put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation.' Even these principles would not, in my judgment, apply in the case, if there had been a quorum without Buell.

“Now the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void *ab origine* and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary, in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as law, unless the parties interested repudiate it, or complain of it; and these may set it aside without showing either fraud or injury.—*Bank of old Dominion v. Dubuque Railroad Co.*, 8 Iowa 227; *Darove v. Fanning*, 2 Johns, Ch. 252; *Bostwick v. Atkins*, 3 Comst. 53, 60; 1 Parsons Cont. 75, 76 and case in note; 1 Lead Cases in Eq. 167; *MacGregor v. Gardner*, 14 Iowa 326, 335.

“As the principal or party interested may confirm the sale, a *mere stranger* cannot make the objection, that the trustee was the purchaser; or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale.'—*Corey v. Wadsworth*, 118 Ala. 507, 508; *Hawley v. Cramer*, 4 Cow. 717, 744; *Edmondson v. Welsh*, 27 Ala. 578; *Foster v. Goree*, 5 Id. 428; *Hannah v. Carrington*, 18 Ark. 85; *Herbert v. Henrick*, 16 Ala. 581; *Greenleaf v. Queen*, 1 Pet. 138; 5 Barr, 97; *Wightman v. Doe*, 24 Miss. 675.

The directors of a corporation are its agents. Their position implies that confidence is reposed in them. The duties which a director assumes to the corporation and the stockholders thereof, disqualifies him from binding the corporation in a transaction in which he is already interested.—*O'Connor Mining & Mfg. Co. v. Coosa Furnace Co.*, 88 Ala. 630.

- In the case at bar, we find the respondent Gass, not Vol. 142.

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only a director but the salaried secretary and treasurer of the company. Not only interested in the donation, but the sole donee. Could there be a stronger appeal for equitable relief, in the absence of actual fraud, the existence or non-existence of which, we deem unnecessary to discuss in order to adjudicate this controversy

We do not think the complainant is estopped from avoiding these conveyances so far as they pertain to the undisposed of lots. The fact that the houses were erected in view of one of the main streets of Mobile, where some of the directors and stockholders may have seen them, or that Gass told Chaudron, (one of the directors) that some of the lots had been conveyed to him, or that the deeds were recorded in a county where a minority of the stockholders, including Gass, resided, was not sufficient to charge the company or stockholders with such notice as would bind them by way of estoppel.

We are familiar with the well established rule, that, a corporation may ratify directly or by implication unauthorized acts of the directors or agents. And that there can be no partial ratification. The acceptance of the fruits of an unauthorized act compels an acceptance of the hardships. But the evidence does not establish any facts from which a ratification can be implied. On the other hand, we find Cook, (one of the directors) repudiating the matter. Just as soon as Platt informed him of the execution of the fourth deed, Cook and Whitehead repaired to Mobile within a short time after the execution of said fourth deed and at once, instigated investigation, reorganized the directory and took speedy steps to inspect the records and books of the company, which had been under the exclusive control and in the possession of Gass since the meeting at Flint. An effort was made at the first meeting to get the books. At the second meeting an attorney was appointed to investigate the acts of the said Gass and report to the company. At the third meeting, possibly after the attorney had reported, we find the directors repudiating and disaffirming the conveyances of the said Gass, except as to the part he had sold to innocent purchasers, and lot 18, upon which he had made valuable improvements, and authorized the at-

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torney to institute proceedings at once, in case Gass refused upon demand, to reconvey the lots. The fact that they did not repudiate the conveyances to some of the lots, did not make the omission of said lots, a partial ratification of the transactions so as to preclude the company from rescinding the contract. The resolution clearly repudiated the transaction, but for equitable reasons, omitted three lots sold to innocent purchasers and one upon which respondent Gass had erected valuable improvements.

The chancellor erred in holding that the pleas were sufficient and in dismissing the bill.

Reversed and remanded.

MCCLELLAN, C J., TYSON and SIMPSON, J.J., concurring.

ON REHEARING.

ANDERSON, J.—Counsel for respondent contends that the opinion in this case, while sound in law is based upon a theory foreign to the one advanced by the bill of complaint. It is true the bill by its averments and in the prayer for specific relief, seeks to have the deeds declared void *ab initio*. The bill however, sets out facts which have been established and which are sufficient to enable the complainant to void the deeds upon its timely election. The resolution could not have been passed without the vote of and participation of the defendant in the meeting. The bill also avers in paragraph six that the respondent “in utter violation of his trust as a director of said company and as secretary and treasurer thereof and in disregard of his fiduciary relationship procured said conveyances.”

The bill by its averments shows that the transaction was voidable and the relief can be had under the general prayer. “Under a prayer for general relief a party cannot recover a claim distinct from that demanded by the bill.” But while the complainant may not be entitled to the relief specifically prayed for, he may under a general prayer, obtain any other specific relief consist-

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ent with the case made by the bill.—Beach on Modern Equity Practice, § 91. “If the facts which he states are broad enough to give him relief, it matters not how narrow his prayer may be, if his bill contains a prayer for general relief.”—*Hill v. Beach*, 12 N. J. Eq. 31-35. Even if the special prayers were such that no relief could be granted under them, the court under the general prayer, may grant an appropriate relief consistent with the case made by the bill.—*Annin v. Annin*, 24 N. J. Eq. 184.

Here we have a bill seeking to cancel deeds, upon the primary idea that they are void, with the averments of facts sufficient to enable the complainant to cancel them because voidable, with a prayer for general relief. The cancellation of the deeds because voidable instead of void would not be inconsistent with the case made by the bill or distinct from the relief demanded by the bill. The bill, however, fails to offer to do equity as to lot 18 as there is no offer to compensate respondent for the improvements. Besides, the resolution repudiating the transaction, omitted the lots sold and lot 18 and, instructed the attorney to commence proceedings for the recovery of said real estate (meaning all but that excepted and which exception contained lot 18). As a rule the bringing of a suit implies *prima facie* the authority of the attorney, but this resolution overcomes the *prima facie* authority of the attorney to sue for this lot 18, and in the absence of any other proof, we must hold that the bill was not authorized as to lot 18.

The rehearing is denied but the opinion is modified to the extent of holding that the complainant is not entitled to relief as to said lot 18, and is entitled to a cancellation of the conveyances as to the unimproved lots, or to so much thereof as was not conveyed to a *bona fide* purchaser before this bill was filed.

The decree of the chancellor is reversed and the cause is remanded in order that he may render a decree in conformity with this opinion.

Reversed and remanded, and rehearing denied.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

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United States Fidelity & Guaranty Co. v. Union Trust & Savings Co.

Action for Breach of Official Bond of Register in Chancery.

1. *Official bonds; payable and conditioned as required by statute regardless of stipulations in bond.*—A bond intended by the obligor thereon to be the official bond of a public officer, and under which said public officer acts, is, by force of the statute (Code § 3070, 3087, 3089) the official bond of such officer, and in legal contemplation and effect such bond is payable and conditioned as the statute requires the official bond of such officer to be payable and conditioned; and it is, therefore, of no consequence that the bond so executed is payable and conditioned differently from that which the statute requires for official bonds, or that the conditions expressed in the bond may not have been broken by the officer.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This suit was brought in said City Court on March 22, 1902, by Union Trust & Savings Company as trustee for Edmund Tatum and Clark Tatum, against The United States Fidelity & Guaranty Company as the surety upon the official bond of W. H. Parks as register in chancery, to recover seventeen hundred dollars, damages for the conversion of certain specified sums of money alleged to have been received by said register in his official capacity, belonging to said Edmund and Clark Tatum, and by the register deposited to his credit as register in the bank of Josiah Morris & Company whereby the money was lost to said beneficiaries. The complainant, after showing the appointment of W. H. Parks as register, averred, among other things, that on the 12th day of November, 1898, said W. H. Parks and the defendant as his surety executed a certain bond as the official bond of said Parks as such register, in the sum of ten thousand

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dollars, payable to the State of Alabama and approved by W. L. Parks as chancellor of the division; that said register acted under said bond; that during the time he was so acting under said bond there came into his hands as register the sum of \$2,835, belonging to the said Edmund and Clark Tatum under a trust in their favor created by the last will and testament of Berry Tatum, Sr., deceased, which sum the register was required to retain in his hands subject to the orders of the court and that said register, while acting under said bond, "made a general deposit of a portion of said fund in his name as said register in and with the banking house of Josiah Morris & Company, as follows:" July 10, 1899, \$320; July 31, 1899, \$11.10; September 30, 1899, \$40; January 4, 1900, \$40; January 16, 1900, \$220; June 26, 1900, \$40; June 12, 1900, \$40; July 12, 1900, \$1,003.33; August 2, 1900, \$318. The complaint then averred that "by reason of said general deposit of said several sums by said Wm. H. Parks as said register with said Josiah Morris & Company, the said sum of seventeen hundred dollars was lost as aforesaid." The due appointment of the plaintiff as trustee as aforesaid was alleged. The complaint made an exhibition of a copy of the bond sued on. The instrument purported to be the bond of the register as an "employee" in the service of the State of Alabama as the "employer," for the register's "honesty in the performance of his duties in the said position." It recites that the said "employer" had delivered to the surety company "a statement in writing relative to the duties, responsibilities and checks to be used upon the employee in said position and other matters," and provided that in consideration of thirty dollars" paid as premium for the period from November 12, 1898, to November 12, 1899, at 12 o'clock noon and upon the faith of the said statement aforesaid by the employer it is hereby agreed and declared that subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this bond, the company shall within three months next after notice, accompanied by satisfactory proof of loss as hereinafter mentioned, has been given to the company

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make good and reimburse the employer all and any pecuniary loss sustained by the employer of money securities or other personal property in the possession of the employe or for the possession of which he is responsible by any act of fraud or dishonesty on the part of said employe in connection with the duties of the office or position hereinbefore referred to and occurring during the continuance of this bond or any renewal thereof and discovered during the continuance or within six months thereafter or within six months from the death or dismissal or retirement of the employe from the service of the said employer." It was further provided that notice in writing to the surety company should be given of any act of omission or commission on the part of the "employe" covered by the bond, immediately after knowledge of the same came to the "employer"; that any claim in respect to the bond should be in writing addressed to the president of the company immediately upon the discovery of any loss for which the company was responsible and within six months after the expiration or cancellation of the bond and that upon the making of such claim the bond should wholly cease as regards any liability on the part of the company and should be surrendered to the company on the payment of such claim. It was further stipulated that the company might cancel the bond at any time "by giving one month's notice to the employer and refunding the premium paid less a pro rata part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond which may have been committed by the said employe up to the date of such determination and discovered and notified to the company within the limit of time hereinbefore provided for." It was further stipulated that no action would lie for the recovery of any claim for any breach of the bond unless commenced within twelve months after the presentation of such claim as aforesaid, and that it was essential to the validity of the bond that the "employe's" signature thereto should be subscribed and witnessed; and it was further provided, in conclusion, that the "employe" should save the surety company harmless "from and against all loss and dam-

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age of whatever nature or kind and from all legal and other costs and expenses direct or incidental which the said company may at any time sustain" in consequence of having entered into the bond. The signature of W. H. Parks, the register, was not witnessed.

The defendant demurred to the complaint, the substance of the demurrer as set forth in the several grounds thereof being that the complaint showed no right of action in the plaintiff; showed no breach of the bond; that it did not show that the defendant was surety on the official bond of the register; that the bond had expired by limitation at the time of the alleged breach; that it was not shown that notice of the alleged breach was given as required by the bond; that it did not appear that three months had expired after notice given as required by the bond; that no right of action was shown in that it did not appear that the alleged breach was by reason of the fraud or dishonesty of the register; that no action would lie on the bond except for the fraud or dishonesty of the register; that the bond was void because the signature of Parks thereto was not witnessed; that the period of one year had expired when the alleged breach occurred; that it was not alleged that the State of Alabama had suffered any pecuniary loss by reason of any act of the said Parks as register; and that it was apparent from the complaint that Parks had entered into no obligation whatever binding him to any one except the defendant in connection with said office of register, and that the suit was prematurely brought in that the liability of the principal had not been ascertained.

The demurrer was overruled by the city court. Thereupon the defendant refused to plead further and the court, after hearing the evidence, rendered judgment for the plaintiff in the sum of \$2,443.34 and for costs. The assignments of error are based on the action of the trial court in overruling the demurrer to the complaint, and in rendering judgment for a greater sum than was claimed in the complaint.

MARKS & SAYRE, for appellant.—As the instrument sued upon contained no promise by Parks enuring to the

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plaintiffs, there was a misjoinder of defendants in the Bryant case, in making Parks a party.—*Painter v. Mauldin*, 119 Ala. 88; *Evans v. Killand*, 9 Ala. 46; *Ferry v. Burchard*, 21 Conn. 603. The plaintiffs could not sue in their own names on the obligation.—See authorities, *supra*.

The bond is to answer for any loss occurring by reason of fraud or dishonesty of Parks, and the complaint alleges no breach of that condition. This means moral fraud, and fraudulent intent.—*Wolf v. Stix*, 99 U. S. 1.

The bond had expired by its own limitation at time of breach complained of.—*City Council v. Hughes*, 65 Ala. 201; *Burge on Suretyship*, 69.

The liability of the surety was defined and limited by the letter and every condition expressed in the instrument sued on, and could not by implication be extended beyond them, and the complaint was defective, in not alleging conformance with all the conditions thereof. *City Council v. Hughes*, 65 Ala. 201; *Anderson v. Bellinger*, 87 Ala. 334; *Miller v. Stewart*, 9 Wheat. 681; *United States v. Hudson*, 10 Wall. 395; *Foxcroft v. Nevins*, 4 Greene (Me.) 75; *Clark v. Lamb*, 76 Ala. 406; *Mechem on Public Officers*, § 282.

HORACE STRINGFELLOW, *contra*.—There can be no doubt that the bond sued on did not conform to the statutory requirements respecting official bonds, its principal variation being in its conditions but the complaint avers that the Register acted under said bond, and was so acting at the time of the said conversion, from which it is alleged the loss to the trust estate accrued. The bond here sued for clearly comes within the curative effect of Section 3089 of the Code of 1896; therefore the bond sued on stands in the place of the Register's official bond, subject "on its condition being broken," to all the remedies which the person agrees might have maintained thereon had it complied with all the requirements of the law.—*McKissack v. McClendon*, 133 Ala. 558.

But even assuming that the bond only indemnified against the *mala fides* of the employee the complaint

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shows a good cause of action. "Dishonesty" is defined "a breach of trust." The complaint avers that the general deposit was made of the trust funds. This was in violation of Section 4668 of the Criminal Code.—*Alstons' case*, 92 Ala. 134. "Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent."—*Reeves v. States*, 95 Ala. 31.

It was unnecessary that the complaint should aver that notice was given and suit brought within the time stated in the bond. The appellant was notified by Section 3089 of the Code that if the bond was acted upon it stood in the place of the official bond and was subject to all of its remedies. The statute was part of the bond, and the notice and time of suit stipulated in the bond are not required by it. The same is true of the stipulation in the bond as to the period of its operation. The Register was elected for six years and the bond here given as his official bond and standing in its place it is for the term stated and the surety could only be released from liability by compliance with sections 3124-3129 of the Code. But the complaint here shows the lending of the trust funds was within the time limited by the bond and its renewal. It was unnecessary to aver that the renewal was in writing.—*Dexter v. Ohlander*, 89 Ala. 262.

One executing an official bond with an insufficient or limited condition would be charged by Section 3089 with knowledge of the fact that notwithstanding such condition the bond if acted under would contain the general condition named in the statutes, and the surety in executing and permitting the bond to be acted under would be presumed to consent to it. "A statute which declares the legal obligation of an official bond is a part of its terms as fully as if its words were expressly written within its condition."—*Clark v. Lamb*, 76 Ala. 407. A surety executing such bond voluntarily assumes liability for his principal according to the obligation of the bond as the law defines it.—*Morrow v. Wood*, 56 Ala. 8; *McKissack v. McClellan*, 133 Ala. 558, 32 So. Rep. 486.

McCLELLAN, C. J.—A bond intended by the obligors thereon to be the official bond of a public officer and

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which such public officer acts under is by force of the statute the official bond of such officer, and in legal contemplation and effect such bond is payable and conditioned as the statute requires the official bond of such officer to be payable and conditioned.—Code, § § 3070, 3087, 3089; *Sprowl v. Lawrence*, 33 Ala. 674; *Lewis v. Lee County*, 66 Ala. 480, 488-9; *Steele v. Tutwiler*, 68 Ala. 107; *McKissack v. McClendon*, 133 Ala. 558.

That the bond sued on in this case was intended by the obligors to be the official bond of Wm. H. Parks as register in chancery for the district constituted of the county of Montgomery. its own terms fully demonstrate. That said Wm. H. Parks acted as such register in chancery under said bond, and was so acting thereunder at the time of the default complained of, is shown beyond controversy. It is, therefore, of no consequence that the condition of the bond is different from that which the statute prescribes for official bonds, nor of any consequence that the condition expressed in the bond may not have been broken by the officer. The condition, which, though not written into this paper, is as essentially a part of it for all the purposes of this action as if it and it alone were written into it, is that the officer, Wm. H. Parks, will faithfully discharge the duties of the office of register in chancery during the time he continues therein, or discharges any of the duties thereof—(Code, 1896, § 3070); and the obligors thereon are liable for any breach of this condition for the use and benefit of every person sustaining damages by such breach—(Code 1896, § 3087). It would be immaterial whether such bond is in terms payable to the state: The law makes it so payable. It would be immaterial to the sureties liability whether Parks executed it: The surety is liable whether he did or not. And it is immaterial that the instrument though signed by Parks, yet on its face imports no obligation on his part to the state: The law imports that obligation into the bond. On the other hand, no account is to be taken of and no operation is to be given to the several stipulations and conditions set down in this paper which tend to limit the liability which an official bond imports or to clog or impeach the

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remedy for the enforcement of such liability. The right of recovery is the same in the abstract and as to amount as if the bond had expressed the statutory conditions and those only; and action upon it is maintainable under the same conditions.

It is altogether inapt and inaccurate to say that the city court in its ruling on the demurrer in line with the foregoing views, made a bond for the parties or even that the law has made a bond which the parties have not made. The law, known of all men (and even of all corporations), said to these parties, if you put forward a paper writing as and for the official bond of this officer and the officer acts under it, that paper writing imports and involves certain liability upon you in certain contingencies. The parties make and exploit this writing for this purpose knowing the legal consequences of their action, and they thereby take those consequences upon themselves. The law, as it was competent for the law to do, merely gave a certain character and attached certain liabilities to certain acts. The defendant performed those acts, and it is not only no legal wrong, but not even a legal hardship for the law through its ministers to enforce such liability.

The city court committed no error in overruling the demurrer to the complaint.

There is error, however, in respect of the amount for which judgment was rendered. The complaint claims seventeen hundred dollars damages and no more. It alleges that by reason of the misfeasance of the register, said sum of seventeen hundred dollars was lost to the plaintiff, and there is no averment that any other sum was lost. It also avers that plaintiff had made demand upon the register for that sum, and there is no allegation of a demand for any other sum. It is quite true that in averring the conversions by the officer divers amounts are stated which in the aggregate equal the sum for which judgment was rendered; but it does not follow that all of these several sums were lost to plaintiff. To the contrary, it may be that enough had been repaid before suit brought to reduce the total loss to the sum of seventeen hundred dollars averred in the complaint to be

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the total loss. Consequently there is no room for the application of the principle that "a judgment for the amount shown due by the declaration or petition may be given although it is greater than the damages laid in the *ad damnum* clause proper." The complaint did not show that such greater amount was due. Because of this error as to amount the judgment of the city court must be reversed. This court will render the judgment the city court should have rendered, for the sum of seventeen hundred dollars with interest from the time of the last deposit made by the register.—*Lister v. Vowell, et al.* 122 Ala. 264, 269.

Reversed and rendered.

HARALSON, DOWDELL and DENSON, J.J., concurring.

Webb & Stagg v. McPherson & Co.

Attachment Suit.

1. *Attachment insufficient; affidavit, writ and bond can be amended*
Any irregularity or defect of form, or of substance in an affidavit for an attachment in the bond or writ of attachment, may, under provisions of the statute, (Code § 564) be amended before or during the trial.
2. *Justice of the peace; amendment of claim so as to bring it within the jurisdiction of justice.*—In a civil suit brought before a justice of the peace, the plaintiff may, at any time before or at the time of the rendition of judgment remit the excess of his demand over and above the sum for which justice is authorized to render judgment, so as to bring the case within his jurisdiction.
3. *Justice of the peace; want of jurisdiction must appear in face of proceedings on appeal.*—Where the question of the want of jurisdiction in a justice of the peace to render a judgment, is raised in the circuit court in proceedings by common law certiorari to vacate the judgment, the want of jurisdiction must appear upon the face of the proceedings filed by the justice in the circuit court in response to the writ of certiorari; and in

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said circuit court it cannot be shown that the record recitals certified by the justice were not true.

4. *Justice of the peace; common law certiorari; judgment cannot be rendered against sureties on certiorari bonds.*—The statute which provides that when on certiorari the judgment is affirmed, judgment must be rendered against the sureties on the certiorari bond, as well as the principal (Code § 493), applied exclusively to statutory certiorari; and when a bond is given for common law writ of certiorari, to bring up to the circuit court, the proceedings before a justice of the peace, upon the affirmance of the judgment, it is error to render judgment against the surety on the certiorari bond.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. J. A. BILBRO.

The facts of the case are sufficiently stated in the opinion.

M. L. WARD, for appellant.—Cited *Publishing Co. v. Press Association*, 102 Ala. 475; *Railroad Co. v. Christian*, 82 Ala. 307; *Railroad Co. v. Brannum*, 96 Ala. 461.

EMERY C. HALL, *contra*.—Cited *Davis v. Bedsole*, 69 Ala. 362-364; *Whorton v. King*, 69 Ala. 365; *Gray v. Southern Ry. Co.*, 116 Ala. 654-655; *Guscott v. Roden*, 112 Ala. 632-636; *Bolin v. Sandlin*, 124 Ala. 578-580.

HARALSON, J.—On the 12th of June, 1902, McPherson & Company commenced a suit by attachment before a justice of the peace against Webb & Stagg, alleging in the affidavit that the defendant was justly indebted to them in the sum of \$108.80. The writ was executed by levying it on 10,000 feet of lumber.

The 18th of June was set by the justice for the trial of the cause. On that day, as appears by the return of the justice, the defendants came and filed an answer to the complaint; set up that the attachment had been issued for the sum of \$108.80; that the record shows that said sum was the amount involved in the cause, and the court had no jurisdiction when the amount involved exceeds \$100.00, and prayed that the suit be dismissed. They also pleaded that they had no notice as required by

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law, and prayed that the suit be abated on that account. This plea recited, as did the other, "comes the defendant and for answer to the complaint says."

On the 12th of June, 1902, the day the attachment was sued out, there appearing to be a defect in the first affidavit, another and amended affidavit appears to have been made, covering the deficiency in the first, and stating that the sum that the defendants were indebted to plaintiffs was \$100.00, after allowing all offsets and discounts. The attachment writ and bond were also correspondingly amended, the amendments appearing in the form of new affidavit, writ and bond. This was allowable.—Code, § 564; *Savage v. Atkins*, 124 Ala. 378. The plaintiff filed this complaint in the justices' court, claiming \$100.00 on an account stated, and for the same amount for goods sold and delivered.

On the day of trial,—18th of June, 1902,—the justice rendered judgment against defendants for \$100.00 and \$6.50 costs. The judgment entry recites, that "this day came the plaintiff and the defendant, * * * and on this day the plaintiff files his complaint in this court, upon an account claiming one hundred dollars as the amount due, and remitting in open court the excess over that sum due from the defendants. It is therefore considered by the court, upon the proof submitted, that the plaintiff have and recover of the defendants the sum of one hundred dollars, the amount so claimed in the complaint, together with the costs of \$6.50 in this behalf expended for which let execution issue." The property levied on was condemned to be sold for the satisfaction of the judgment.

We have uniformly held, that in an action of this nature, the plaintiff may before, or at the time of rendition of judgment, remit the excess of his demand over and above the sum for which the justice is authorized to render judgment, so as to bring the case within his jurisdiction.—*Davis v. Bedsole*, 69 Ala. 364; *Wharton v. King*, *Ib.* 365; 2 Brick. Dig. p. 175, § 17.

On the 21st of June, 1902, the defendants filed a petition for a common law writ of certiorari in the circuit court of Blount county, which being presented to the

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judge of the circuit court of that circuit, was granted upon petitioners entering into bond in the sum of \$250.00. The cause was tried in the circuit court on the 8th of May, 1903, and that court rendered judgment affirming the judgment of the justices' court, and rendering judgment against defendants, and the sureties on the certiorari bond.

During the progress of the trial, for the purpose of contradicting the recitals of the judgment entry before the justice of the peace, the petitioners offered to show that there was no appearance made in the case, except as shown by the written pleas. They offered further to prove that no papers were filed at the time of the trial except the one describing the debt to be \$108.80; that no other papers were filed or were in said justice's court, at this time, and that no other appearances were made by defendants except that shown by said paper, and petitioners never saw the papers describing the debt as being \$100.00, until they were in the circuit court. Exceptions to this evidence was sustained, and in this there was no error. The court was shut up in rendering judgment, to what appeared on the face of the proceedings, and could not permit it to be shown that the record recitals of the inferior court, when the judgment was rendered, were not true.—*Independent P. Co. v. A. P. Association*, 102 Ala. 476; *Gray v. Sou. Ry. Co.*, 116 Ala. 654; *Bolin v. Sandlin*, 124 Ala. 578; *Town of Camden v. Bloch*, 65 Ala. 236.

The common law writ of certiorari is a common law proceeding, not provided for by statute. The only certiorari bond provided for by statute in this state, is under § 482 of the Code, which is a bond for a statutory certiorari. A bond for the writ at common law as a *superse-deas* was not necessary, unless made so by statute. It was discretionary with the court to issue the writ or not, and it was competent for the exercise of its discretion in granting it, to impose a bond for costs and the indemnification of the defendants in certiorari, as the terms on which the writ should be allowed. But any such bond was a common law and not a statutory bond.—4 Ency. Pl. & Pr. 184, 185; *Childress v. McGhee*, Minor, 131.

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Section 493 of the Code, which directs, on the affirmance of the judgment, that one be rendered by the circuit court against the sureties as well as the principal in the certiorari bond, relates to statutory and not to common law certiorari.

There was error, therefore, in the judgment below, in so far as it was rendered against the sureties on the certiorari bond. For this the judgment will not be remanded, but the same will be here corrected, by annulling and setting it aside as to the sureties on said bond, and leaving it to stand against the defendants alone. As thus corrected, the judgment below is affirmed.

Corrected and affirmed.

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

Montague *et al.* v. International Trust Co.

Petition in Equity to Set Aside Sale of Lands by Register.

1. *Sale of lands by register; when properly set aside.*—Where lands are sold by the register in chancery under order of the court, and upon exceptions to the confirmation of the sale, and on application to have the sale set aside and a new sale ordered, it is made to appear that a much larger price will be paid for the property on a resale, and such price is guaranteed by a deposit of money with the register, and there is evidence tending to show the inadequacy of the price paid at the sale by the register, the chancellor does not err in refusing to confirm such sale and in setting it aside.

APPEAL from the Chancery Court of DeKalb.
Heard before the Hon. W. H. SIMPSON.

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In this case, the International Trust Company filed a bill to foreclose a certain deed of trust executed by the Alabama Kaolin Company. The deed of trust was ordered foreclosed, and the court rendered an order for the sale of the property by the register. In accordance with the order of sale, the property was sold by the register, the appellants in this case becoming the purchasers. After this sale the Alabama Kaolin Company and others filed objections to the confirmation of the sale, and at the same time also filed an application that the said sale be set aside and the property ordered resold. The petitioners in said application setting out the fact that the property was sold at an enormously inadequate price, and stating to the court that they would give greatly more than was paid for at the sale, and offered to make a substantial deposit with the court to show their good faith. Upon the hearing of the exceptions to the confirmation of the sale and the application for a resale of the property, the court ordered that the sale theretofore made by the register be set aside, and that a new sale be made, at the same time requiring the petitioners to make a deposit of \$4,000 with the register. From this order of the court the present appeal is prosecuted.

JOHN F. MARTIN, for appellants.—Cited *Parker v. Bluffton Cr. Whl. Co. et al.*, 108 Ala. 140; *Littell v. Zuntz*, 2 Ala. 256; *Glennon v. Mittenight*, 86 Ala. 455; *Holly v. Bass*, 68 Ala. 206; *McLaughlin v. Bradford*, 82 Ala. 431; *Ray v. Womble*, 56 Ala. 32; *Grigg v. Banks*, 59 Ala. 311; *Cramer v. Watson*, 73 Ala. 127; *Pate v. Hinson*, 104 Ala. 599.

No counsel marked as appearing for appellee.

TYSON, J.—Aside from every other consideration, we are of the opinion that the chancellor, in the exercise of his sound discretion, was authorized to set aside the sale made by the register upon the ground of inadequacy of price. It is true the evidence before him was in conflict as to whether the property brought its real value; and, perhaps, if a larger price was not offered and secured,

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we might be forced to the conclusion that the weight of the evidence on this point was with the appellants. But with the fact established that a much larger price will be paid for the property on a resale and that price guaranteed, in part, by a deposit of money with the register, in connection with other evidence tending to show inadequacy of the bids of appellants, we are unwilling to affirm that the chancellor erred in refusing to confirm the sale.—17 Am. & Eng. Law, (2nd ed.), pp. 992, 1004.

Affirmed.

Mc'LELLAN, C. J., HARALSON and DENSON, J.J., concurring.

Seaboard Air Line Ry. v. Hubbard.

Attachment Suit.

1. *Rulings on motion to quash should be shown by bill of exception on appeal.*—The rulings of the trial court on motion to quash a writ of attachment, service, etc., will not be reviewed on appeal unless such rulings are presented by a bill of exceptions.
2. *Pleading and practice; how assignment of error upon pleadings considered on appeal.*—When an assignment of error, based upon the rulings of a trial court, upon demurrers to two separate pleas, is a joint and single assignment, it is unavailing to work a reversal of the judgment, unless there was error in the ruling upon the demurrer to each of the pleas.
3. *Action against railroad company for breach of contract of affreightment, admissible in evidence.*—In an action against a railroad company to recover damages for the breach of a contract of affreightment, a statement and a certificate made by the conductor of the defendant relating to a transaction that was past, having reference to the freight shipped over the defendant's line, is not admissible in evidence over the defendant's objection.

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APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. S. ANDERSON.

Asbel Hubbard, a resident of Mobile, instituted a suit against the defendant in the circuit court of Mobile county, Alabama, on the 26th day of September, 1902, by having a summons issued by the clerk on said last named date. This summons was never served, for the reason that there was no person in Mobile county upon whom it could be served. Subsequently, on the 27th day of September, 1902, the plaintiff made an affidavit for attachment upon the ground that the defendant was a non-resident, and writ of attachment was issued on the same day by the clerk of the circuit court of Mobile county, and was, on October 6th, 1902, levied upon a freight car, the property of the defendant, by the sheriff of Mobile county. Notice of the levy was given by the sheriff of Mobile county, in writing, which notice was served upon the agent of the defendant at Montgomery, Alabama, by the sheriff of Montgomery county, Alabama. Subsequently, on the 11th day of October, 1902, the car levied upon was released, in pursuance of an agreement entered into between counsel. Subsequently, on November 25, 1902, defendant appearing specially by its counsel, made a motion, first, to quash the service in the case; second, to quash the notice and service, which motions were overruled by the court. Thereafter the defendant made a motion to quash the writ of attachment, still appearing specially and solely for that purpose. This motion was overruled by the court. These rulings are not shown by the bill of exceptions.

Thereupon the defendant filed two pleas in abatement, which are in words and figures as follows: "1. Because this defendant says that at the time of the commencement of this suit it was a non-resident corporation of the State of Alabama, and was a corporation incorporated under the laws of Virginia and a citizen of the State of Virginia, and resided out of the State of Alabama, and that it had a known place of business in the State of Alabama, to-wit, Montgomery, Alabama, and had named an authorized agent therein, to-wit, Edward A. Graham, Montgomery, Alabama, and that at the time of the com-

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mencement of this suit this defendant was not doing business in the county of Mobile and State of Alabama." "2. That this defendant is a corporation organized under the laws of the State of Virginia, and is a citizen of the State of Virginia and resides out of the State of Alabama, and the cause of action upon which this suit is brought arose outside of the State of Alabama and in the State of North Carolina; and that the suit is not upon any contract entered into with reference to a subject matter within this State, but that the respective rights of the parties to this suit, so far as they relate to the subject matter thereof, depend upon the laws of the State of Virginia in which this defendant resides, or the laws of the State of North Carolina, in which the cause of action, if any, arose. And this the defendant is ready to verify." "Wherefore, it prays judgment of the said writ and declaration, and that the same may be quashed."

The plaintiff demurred "separately and severally to each plea in abatement, upon the following grounds: 1. That it appears from the complaint in this cause that this action is upon a contract of affreightment made in Alabama and within the jurisdiction of this court. 2. Because this cause is now an attachment suit and strictly within the class of cases permitted by the statute laws of Alabama. 3. Because it affirmatively appears from said pleas that defendant is a non-resident and from the complaint that the cause of action is upon a contract made in Alabama and that an attachment properly issued thereon and that the defendant replevied the property levied on in this cause and has thereby submitted itself to the jurisdiction of this court.

This demurrer was sustained and issue was joined on plea of the general issue.

The evidence disclosed that the plaintiff shipped via the Mobile & Ohio Railroad, from Mobile, Alabama, to Wilmington, N. C., a carload of bananas on the 28th day of June, 1901; that the car of bananas left Mobile late in the afternoon of said last named date and were in good condition when they started. That when said bananas arrived at Wilmington they were worthless. That said bananas arrived at Wilmington over the line of the

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defendant company; that in North Carolina they were in charge of the defendant company, and that the vents of the car were closed, when witness Murray saw them in North Carolina. There is no question but that the bananas were damaged when they arrived at Wilmington.

During the trial of the case the witness Murray testified that one Roseborough, who was conductor of the train in which was the car containing the damaged bananas, stated to him upon the arrival of said train at Wilmington, N. C., that the vents in the car were closed when he took charge of the car, and that upon the witness Murray asking said Roseborough to make a written statement to that effect, he made such statement. This written statement was introduced in evidence by the plaintiff.

The defendant moved the court to exclude the testimony of the witness Murray, as to what occurred between him and Roseborough, the conductor, together with the paper claimed to have been written by said conductor, offered in evidence, because same was a declaration of an agent as to a past transaction, and because said agent had no authority to bind the principal in such way.

The court overruled the motion and to this ruling the defendant duly excepted. There was verdict and judgment for the plaintiff, and from this judgment the defendant appeals.

The assignment of error in reference to sustaining the demurrers to the pleas in abatement was as follows: "The court erred in sustaining the demurrer to pleas in abatement one and two."

GRAHAM & STEINER and MCINTOSH & RICH, for appellant.—Suing out of summons and complaint is commencement of suit when placed with sheriff.—*West v. Engel*, 101 Ala. 509. Actions *ex contractu* must be brought in the county of the residence of the defendant. *Montgomery Iron Works v. Eufaula Oil & Fertilizer Co.*; 110 Ala. 395; *Home Protection of North Ala. v. Richards & Sons*, 74 Ala. 466. If the action brought is *ex contractu* the demurrer to the plea in abatement should have

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been overruled; if *ex delicto*, there can be no question nor will it be argued but that the pleas in abatement were good.

The court below clearly erred in refusing to exclude the testimony of the witness Murray as to his conversation with Conductor Roseborough. The reasons set forth in the objection are perfectly plain and need no argument to sustain them. It was a declaration of an agent as to a past transaction, and not such an agent whose declaration would bind the principal. This is clearly an error, and one which should work a reversal of the case.

FITTS & STOUTZ, *contra*.—The demurrer to the plea in abatement was properly sustained.—*Stamphill v. Franklin Co.*, 86 Ala. 392; *Kres v. Porter*, 31 So. Rep., 377 Ala. The motion to exclude the testimony of the witness Murray was properly overruled. This testimony was of things that happened while the car was still in transit just as the car rolled in and was so closely connected with the action itself that it is part of the *res gestae*.—*Roland v. State*, 105 Ala. 41; *Marks v. Bank*, 79 Ala. 550. 561; *Helton v. Ala. Mid. Ry.*, 97 Ala. 282; *Perryman v. Wolfe*, 93 Ala. 291.

DOWDELL, J.—The first three assignments of error are directed to rulings of the lower court on motions to quash the writ of attachment, its service, etc. Such rulings are subject to review on appeal only when duly presented by bill of exceptions.—*Logan v. Adams Machine Co.*, 135 Ala. 475, and authorities there cited. The bill of exceptions in the present case fails to set out the motions and the rulings thereon, and the fact that exceptions were reserved to such rulings. It is wholly silent as to these matters.

The suit was commenced by summons and complaint. The claim of damages is based upon an alleged breach of contract for the affreightment of goods, and is therefore an action *ex contractu*. Subsequent to the suing out of the summons and complaint, the plaintiff sued out an ancillary attachment under section 558 of the Code. At the first term of the court after the commencement of the

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suit, the defendant filed pleas in abatement numbered 1 and 2 to the jurisdiction of the court. To these pleas the plaintiff interposed demurrers which were sustained by the court. The assignment of error on the ruling of the trial court on the demurrer to these two pleas is a joint and single assignment, and unless there was error in sustaining the demurrer to both pleas, the assignment is bad and unavailing.—*Mobile, Jackson & Kansas City R. R. Co. v. Bromberg*, (Ala.), 37 So. Rep. 395. The plea numbered 2 proceeds upon the theory that the action is in tort, whereas, it is *ex contractu*. The plea was therefore bad and subject to demurrer.

Upon the trial of the case, the plaintiff was permitted by the court against the objection of the defendant, to prove a statement made by one Roseboro, a conductor of the defendant company, upon the arrival of the train, in which was the car of bananas in question, at Wilmington, N. C.; that the vents of the said car were down when he received the same at Hamlet, N. C., and, also, a certificate to the same effect made by said Roseboro. Both the statement and the certificate related to a transaction that was past and was not admissible in evidence over defendant's objection. The trial court erred in the admission of this evidence, and for this error the judgment must be reversed and the cause remanded.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DENSON, J.J., concurring.

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City Council of Montgomery v. Kelly.

Prosecution for Issuing Trading Stamps Without a License.

1. *Municipal corporation; license for issuing trading stamps; validity thereof.*—An ordinance of the city of Montgomery requiring each merchant, doing business in said city, who shall issue any trading stamps in connection with his business, to pay “a license tax of \$100.00 therefor,” and fixing a penalty of \$100.00 for each stamp issued without having taken out said license, is unconstitutional and void.

APPEAL from the City Court of Montgomery.

Tried before the Hon. WILLIAM H. THOMAS.

The appellee in this case, William Kelly, was arrested and fined by the recorder of the City of Montgomery for issuing trading stamps, checks or devices of like kind, to his customers, without having obtained a license therefor, as provided by an ordinance of the city council of Montgomery. He appealed to the city court of Montgomery, where the case was tried *de novo*. In the city court the case was tried upon agreed statement of facts, and upon said facts the court gave the general affirmative charge in favor of the defendant, at his request. The facts as agreed upon necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

There were verdict and judgment finding the defendant “not guilty.” The city council of Montgomery appeals and assigns as error the giving of the general affirmative charge requested by the defendant, and the refusal to give the general affirmative charge requested by the city council of Montgomery.

RAY RUSHTON, for appellant.—The city council under Section 18 of its charter has powers “to license all busi-
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nesses, trades, occupations and professions, not prohibited by the Constitution and laws of the State * * * to fix the amount of the license and to provide a penalty for doing business without a license." There is also a proviso "that but one license shall be collected or required of any person * * * for any particular trade, occupation or profession, using but one place of business, &c." Acts 1894-95, page —. It will be observed that this power is not only for police regulation, nor for revenue license only, but is authority to license for both purposes.—*Vanhook v. Selma*, 70 Ala. 361; *McQuillan on Mun. Ordinances*, Sec. 408. As a license for revenue and for police regulation both, or as a license for either purpose, it is not so excessive as to be void. It is presumed to be reasonable.—*Van Hook's case*, *supra*. The fact that the business is in the nature of a lottery, supports the reasonableness of the license.—*Van Hook's case*, *supra*; *Langsburg v. D. C.*, 11 App. D. C. 512. It was decided in *State v. Shugart*, 138 Ala. 11, that the business was not prohibited by the Constitution or laws of Alabama. It was, therefore, competent for the city to enforce the license.

HILL, HILL & WHITING, *contra*.—The ordinance involved in this controversy is clearly void. It is clearly an attempt to place upon a legitimate business an oppressive and prohibitory burden, unauthorized by law and is also discriminating against those engaged in this business. If the ordinance is oppressive, unreasonable, prohibitory or discriminating it is void. This is elementary law. This business is a legitimate business; it is not a lottery nor is it a gift enterprise, no element of chance enters into its business.—*State v. Shugart*, 35 So. Report, 28. It is a lawful business and does not fall within the police power.—*State v. Dalton*, 48 L. R. A. 775 (R. I. 1900); *Pl. v. Dycker*, 72 App. Div. 308 (N. Y. 1901.)—*State v. Dodge*, 76 Vt. page — (1904.)—*Pl. v. Gillson*, 109 N. Y. 389 (1888); *Long v. Maryland*, 74 Md. 565, (1891.)—*Comm. v. Emerson*, 165 Mass. 466 (L. 1896.)—*Comm. v. Sisson*, 178 Mass. 578; *Comm. v. Moorhead*, 7 Co. Rep. 315; *Ex parte McKenna*, 126 Cal.

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429. There are other cases, but the above are the more important and are clearly sufficient to establish the foregoing proposition, then if this business does not fall within the police power, it can not be prohibited either directly or indirectly.—*Maryland: Long v. Md.*, 74, 565, 1891; *Pennsylvania: Comm. v. Morehead*, 7 Co. Rep. 315; *New York: Pl. v. Gillson*, 109 N. Y. 389, 1888; *Massachusetts: Comm. v. Emerson*, 165 Mass. 446.

SIMPSON, J.—As shown by the agreed statement of facts, set out in this case, the ordinance of the city of Montgomery provided a regular license for wholesale and retail merchants, the amount of the license fee in each case, being regulated by the amount of the stock of merchandise carried by the merchant, and by another ordinance (§ 905) provided that each person, firm or corporation engaged in any business for which a license is required and failing to pay said license should be fined not less than ten nor more than one hundred dollars.

Subsequently the city council passed another ordinance, fixing a license fee of one thousand dollars on Trading Stamp Companies (described in the statement of facts), and, later on, another ordinance requiring each merchant, who shall issue any trading stamps, in connection with his business, to pay “a license tax of one hundred dollars,” and fixing a penalty of one hundred dollars for each stamp issued without said license. The defendant was tried for this last named offense, admitted the issuing of the stamps, and, on the written request of the defendant, the judge of the city court gave the general charge in favor of the defendant, the jury returned a verdict of not guilty, and the city council brings the case to this court by appeal.

The license of occupations originated in the exercise of police power, by the state and municipalities, and when a license is issued for police purposes, it must be used as a means of regulation only and cannot be used as a source of revenue, and in the case of useful trades, it cannot exceed the amount of the expense of issuing and a reasonable compensation for the expense of municipal supervision.—*Van Hook v. City of Selma*, 70 Ala. 361.

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Yet a custom has grown up, until it is recognized as one of the powers of legislative assemblies to require a license tax of all persons, firms and corporations, pursuing various business callings, and it is called a privilege tax, and is held not to be subject to the constitutional limitations, either as to amount or uniformity. Yet this does not mean that the power to require a license tax has no rule or limit for its guidance. Although the state may select certain occupations and require those who engage in them to pay a license tax, while those who engage in other occupations are not so required; yet it cannot make a classification which is arbitrary and has no just or reasonable basis.—Judson on Taxation, § 459. “Discrimination between members of the same natural class have been uniformly condemned.”—Id.

It has been said that a license tax is “either a license, strictly so called, imposed in the exercise of the ordinary police power of the state, or it is a tax, laid in the exercise of the power of taxation,” also that “the pursuit of the ordinary callings of life can only be so far restrained and regulated as such restraint and regulation may be required to prevent the doing of damage to the public, or to their persons.—Tiedeman’s Limitations of Police Powers, p. 273.

It is sometimes difficult to determine, with accuracy, whether a given enactment provides for a license as a police measure, or authorizes it simply as a privilege tax on certain occupations, though it is often important to determine this question, in order to properly pass upon the validity of the law; for the distinction is clearly recognized, and it is also recognized that the amount which may be fixed for a license, under the police power is limited, as shown in a previous part of this opinion; while a wider latitude is allowed, when it is a revenue measure, and this court has decided that where power is granted to a municipal corporation to license for police purposes merely, it cannot be used, as a source of revenue.—*Van Hook v. City of Selma*, *supra*.

And the courts now recognize the right to so combine the police regulations and the taxing power, as to levy a

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license tax to discourage and even break up a business. Cooley on Taxation, (2nd ed.), p. 20.

But this applies only to those lines of business which, while they are tolerated, are recognized as being hurtful to public morals, productive of disorder, or injurious to public.—Tiedeman on Limitations of Police Power, pp. 273, 277, 278; 21 Am. & Eng. Ency. Law, (2nd ed.), p. 778.

Without entering into the various definitions which have been given, in order to distinguish between a license, which is strictly a police regulation, and one which is simply a privilege tax on the occupation, we think it is safe to say that, in this case, there can be no license tax imposed except one which is simply a privilege tax on the business. Not only does the ordinance itself fail to provide for any regulations which would indicate an exercise of the police powers, but the character of the business, shows it to be one of the legitimate, and useful lines of trade, which neither the state nor the municipality can subject to police regulations, with any color of reason.

Then the question arises can the law-making department of the government, in providing for privilege occupation taxes, make such discrimination between parties engaged in like lines of business, as to place additional burdens on one, which place him, to that extent, at a disadvantage, as compared with the others.

It is not disputed that the legislative department has the right to select what occupations shall bear a license tax and what one shall not, and it must be left to its discretion as to what is equal and right in that matter, and it is also admitted, as before stated, that by reason of the fact that this is not strictly speaking a tax on property, it does not come within the letter of the constitutional provision which requires that "All taxes levied on *property* in this state shall be assessed in exact proportion to the value of such property," (Const. § 211), and, while it may be said that this constitutional provision indicates a general purpose in the constitution to provide absolute uniformity in matters of taxation, and, to that extent may be looked to in construing other provisions, yet without the aid of other provisions and principles of law, it is not controlling in this case.

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In commenting on this constitutional provision this court has said "So long as the burden falls with equal weight upon every member of a given class, natural and artificial alike, it is difficult to formulate an argument that such levy violates any provision of our own or of the federal constitution."—*Quartlebaum v. State*, 79 Ala. 4.

And, in another case, in which it was decided that this and another similar provision did not apply to a privilege tax required of corporations, Brickell, C. J., said, "We may concede that, when a tax is imposed on avocations or privileges, or on the franchises of corporations it must be equal and uniform. The equality and uniformity consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed."—*Phoenix Carpet Co. v. State*, 118 Ala. 151-2.

As a constitutional warrant for this expression of the Chief Justice, our constitution provides that among the inalienable rights of every citizen "are life, liberty, and the pursuit of happiness."—Const. Ala. § 1; also "that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and, when the government assumes other functions it is usurpation and oppression." Const. Ala. § 35.

While the XIV amendment to the constitution of the United States prohibits a state from making or enforcing "any law which shall abridge the privileges or immunities of citizens," etc. The Supreme Court of the United States has declared that "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Larson v. Steele*, 152 U. S. 137.

While perfect equality, in taxation of any kind is unattainable, yet "When, for any reason, it becomes discriminative between individuals of the class taxed, and selects some, for an exceptional burden, the tax is deprived of the necessary element of legal equality, and be-

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comes inadmissible."—Cooley on Taxation, (2nd ed.), p. 169, (3rd ed.), pp. 259-260.

In a case in Kentucky, where the statute required druggists to pay a license fee of \$50.00 for retailing liquors, in addition to the regular druggist's license, the supreme court, while holding that, as a police measure, the subject being spirituous liquors, the license could be sustained, yet as a revenue measure, it would be unlawful "to single out * * * any particular commodity * * * or encumber with a special tax any part * * * of the druggists' trade properly embraced in the conduct of his business as a whole." "The legislature, taxing the whole, cannot again tax the parts * * * This would be such an arbitrary method of taxation as to be a violation of the Bill of Rights."—*Commonwealth v. Fowler*, 96 Ky. 166, 170.

"A city cannot divide a single taxable privilege, and require a separate license for each of the elements."—2 Cooley on Taxation, (3rd ed.), p. 1103, and note 1; *Ex parte Sims*, 40 Fla. 432; *Canova v. Williams*, 41 Fla. 509.

The effort to fix a discriminative license tax on department stores is declared by the supreme court of Missouri to be a violation of the Bill of Rights.—*State ex rel Wyatt v. Ashbrook*, 77 Am. St. Rep. 765, 776-7; see also *City of Chicago v. Netcher*, (Ill.), 55 N. E. Rep. 707.

The liberty which is so sedulously guarded by the constitutions of the United States, and of this and other states comprehends more than the mere freedom from personal restraint. It includes the right to pursue any useful and harmless occupation, and to conduct the business in the citizens own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation. If it be allowed that an additional burden may be placed upon a merchant who chooses to advertise his business by offering a small gratuity to customers in the shape of these trading stamps, it would be equally lawful to place an extra burden on one who advertises his business in the papers, or one who offers, out of his own stock, a certain gratuity to every one purchasing goods

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to a certain amount, or one who erects a handsome sign in front of his store, etc.

So long as his manner of conducting his business does not offend public morals and work an injury to the public, it is his constitutional right to pursue, on terms equal to that allowed to others in like business, even though his methods may have a tendency to draw trade to him, to the detriment of competitors.—*Young v. Commonwealth*, (Va.) 45 S. E. Rep. 327; *State v. Dalton*, 22 R. l. 77; *People ex rel Madden v. Dycker*, 72 N. Y. App. Div. Sup. Ct. 308; *People v. Gillson*, 109 N. Y. 389; *Long v. State*, 74 Md. 565; *Ex parte McKenna*, 126 Cal. 429.

The only cases so far as we have been able to ascertain, in which the courts take a different view of the general subject of trading stamps are *Lansburgh v. Dist. Columbia*, 11 App. Cases D. C. 512, which was founded on a statute defining what a "gift enterprise" is, (and the court suggested that, even, in that case, the statute would not be operative in cases of a sale of some lawful article, accompanied by a gift * * * where there was no chance * * * and the gift was not the real object of the purchase), and *Fleetwood v. Read*, (S. Ct. of Washington), 47 L. R. A. 205, which is not supported by any authority.

In the case, now under consideration, the defendant with other merchants, paid the regular license tax assessed in accordance with the amount of stock carried, and the ordinance in question, required of any merchant who issued trading stamps an additional license of \$100.00 without regard to the amount of stock carried, and it also made him liable to a fine of \$100.00 for each stamp issued, without license.

It will be noticed that this license was, not for engaging in any business, but for the manner in which he chose to conduct the business already licensed.

This is such a palpable attempt under the guise of a license tax, to fix a penalty on the merchant, for conducting his business in a certain way, that, under the authorities heretofore cited, we hold it to be unconstitutional and void. Our own court has decided that the trading stamp business is not a gift enterprise or lottery.—*State v. Shugart*, 138 Ala. 86.

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As to the powers granted by the city charter of Montgomery, we have not deemed it necessary to go into an exhaustive discussion, although it lies upon the surface that said charter itself provides "that but one license shall be collected or required of any person, firm or corporation, or for any particular trade, occupation, business or profession using but one place of business in carrying on such business, trade, occupation or profession." Acts, 1894-5, p. 635. § 10.

The judgment of the court is affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

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Action Upon Promissory Note.

- 1 *Insanity; contracts of insane persons absolutely void.*—In this state, a contract of an insane person, whether it be a deed or any other form of contract, and whether written or resting in parol, is absolutely void; and therefore a party contracting with an insane person takes no benefit under such contract, nor acquires any title to property obtained by virtue of such contract.
2. *Insanity; endorsement of promissory note by payee who is insane, void, and confers no right upon endorser.*—The endorsement of a promissory note by the payee therein who is insane, is void and confers no right upon the endorser; and in an action by the endorsee upon a note so endorsed against the maker thereof, the insanity of the payee and endorser at the time of the endorsement and transfer, is a valid defense and can be interposed by the maker.
- 3 *Action upon promissory note; insanity; admissibility of evidence.* Where in an action upon a promissory note by an endorsee of said note, the defendant files a sworn plea, denying that the plaintiff was the party really interested in the note sued on, evidence that the payee of the note was insane at the time he transferred it, is competent and admissible, and it is error for the court to exclude such evidence.

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APPEAL from the Circuit Court of Barbour.

Tried before the Hon. A. A. McDONALD, Special Judge.

The purpose of this suit and the facts in reference thereto are sufficiently stated in the opinion. The special pleas referred to in the opinion are as follows: "4. Now comes the defendant in the above case and for answer to the complaint says: That at the time of the execution of the transfer or endorsement of the note sued on in this case, Z. Bush, the payee in said note was insane and incapable by reason of his mental condition to make a contract and that said transfer or assignment of said note is void and no title passed thereby, and therefore neither the plaintiff or his intestate acquired any title by said transfer or assignment, and that the payee in said note is now and has at all times been the owner of said note and the party really interested in same. "5. Defendant says in answer to the complaint that at the time of the execution of the transfer of said note the said Bush was insane and incapable of making said contract of transfer, and that he has ever since and is now insane, wherefore defendant says said transfer is void. "6. That at the time of the execution as well as at the time of the transfer and endorsement of the note sued on, Zachariah Bush, the payee and transferror, had been legally adjudged insane under proceedings and decree of the probate court of Barbour county, which proceedings and decree were of record in said court at the time of said transfer, and that said decree so adjudging him insane was in force at the time of said execution and transfer. "7. Defendant for answer to the complaint says: that at the time of the execution of the endorsement or transfer of the note sued on in this case, Z. Bush, the payee and transferror of said note was insane, *non compos mentis* and incapable by reason of such insanity of making said contract of assignment, and the amount paid or the consideration paid for said note by plaintiff's intestate was totally inadequate to the value of said note, and said transfer of said note was a fraud on said Bush and void. "8. Defendant says that in the transfer of the note sued on the amount paid or the consideration paid for said note by plaintiff's intestate was grossly inadequate to the value of said note,

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and said transfer of said note was a fraud on the payee and transferrer and void, said payee and transferrer being at the time of said transfer so weak mentally as to have been overreached by the plaintiff's intestate in procuring said transfer."

The grounds of the demurrers to the 4th, 5th, 6th and 7th pleas are sufficiently stated in the opinion. To the 8th plea, the plaintiff demurred upon the ground that if there was fraud practised upon the transferrer by the plaintiff's intestate, it is not available to the defendant in this suit, and that said plea fails to show that plaintiff's intestate, or anyone for him, practised any fraud upon the transferrer of the note. The demurrers to these several pleas were sustained. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the general affirmative charge in his favor, to the giving of which charge the defendant duly excepted. Under the opinion on the present appeal it is unnecessary to set out in detail the facts relating to the rulings of the trial court, which constitute the bases of the 8th and 9th assignments of error.

There were verdict and judgment in favor of the plaintiff. The defendant appeals and assigns as error the rulings of the trial court in sustaining the demurrers to the defendant's special pleas, and the rulings of the trial court to which exceptions were reserved.

A. H. MERRILL and W. C. SWANSON, for appellant. The act by an insane person is absolutely void and not merely voidable. The act of the payee in endorsing, and in attempting to transfer the note to the plaintiff's intestate was a nullity—passed no right or title whatever to the paper sued on. The appellant had the right to set up this defense because the transaction by which the appellee procured the note being a nullity, payment to the appellee would not absolve appellant from a subsequent payment to the original payee or his legal representative. The legal proposition that the acts or attempted contracts of a *non compos* are absolutely void, is firmly settled by the following authorities:

Dougherty v. Powe, 127 Ala. 577; *Burke, Executor v. Allen*, 29 New Hampshire 106; (which is a well considered case); *Peaslee v. Robins*, 3 Metc. 164; *Hannah v.*

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Sheldon, 20 Mich. 278; *Trust Co. v. Boone*, (102 Ga. 202), American State Reports, Vol. 66, page 167; Byswell on Insanity, Par. 300, page 307-308.

E. P. THOMAS and G. W. PEACH, *contra*.—While it has been held that the deeds and appointments of attorneys of insane persons are void, it has nevertheless been wisely held that all other contracts of insane persons were merely voidable at the option of the *non compos mentis*, his guardian or personal representative.—Clark on Contracts, pp. 263 and 271. The precise question involved in this case was decided against the defendant in the case of *Carrier v. Sears*, 4 Allen (Mass.) 336.

For other authorities on the proposition that the contracts of insane persons are voidable and not void, see Amer. & Eng. Encyc. Law (2d ed.) Vol. 16, page 629, § 6, and cases cited. No citations to the contrary.—*Allen v. Berry-hill*, 1 Amer. Reports, p. 309, (This is a well considered case). Clarke on Contracts, pp. 263, *et seq.* and 271; 7 Waite's Actions & Defenses, 152; Bishop on Contracts, paragraphs 972 and 973; 2 Kents Commentaries, (7th ed.), 562; Norton on Bills & Notes, page 216; *Jackson v. Gumals*, 2 Cow. 552; *Ingratham v. Baldwin*, 12 Barb. 9, (s. c. 9 N. Y. 45). *Story v. Conger*, 36 N. Y. 673; Story Equity Jur. Sections 751, 771, 772; *Worrell v. Munn*, 38 N. Y. 37; *Williston v. Williston*, 41 Barb. 6; *Kerr v. Purdy*, 50 Barb. 25 and 438; *Freeman v. Freeman*, 51 Barb. 306; *Lobbell v. Lobbell*, 36 N. Y. 327.

DENSON, J.—This is a suit upon a promissory note executed by defendant. David L. Walker, and two other persons, (who are not sued) to Zachariah Bush. The note was transferred by the payee to John E. Crews, who brought this suit. Crews died and the cause was revived in the name of James J. Winn, Jr., as the administrator of his estate.

The defendant filed a sworn plea denying that the plaintiff was the party really interested in the note sued on, and also attempted by other special pleas to defend the suit upon the ground that the payee Bush, at the time he transferred the note to Crews was insane.

Demurrers were interposed to the pleas which set up the defense of insanity. The principal ground of demur-

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rer to the pleas, the ones which presented the real question at issue, are, that the contract of assignment of a note by an insane person is not void but voidable, and that insanity is a personal plea and not available to the defendant. The demurrers were sustained.

Whatever may be the rulings by the courts of other jurisdictions upon the question, this court is fully committed to the doctrine, that the contract of an insane person is absolutely void.—*Dougherty v. Powe*, 127 Ala. 577, and authorities there cited; *Wilkinson v. Wilkinson*, 129 Ala. 279; *Galloway v. Hendon*, 131 Ala. 280; *Milligan v. Pollard*, 112 Ala. 465.

We fail to appreciate the distinction attempted to be made by counsel for appellee in their argument, between deeds and other contracts made by an insane person, with reference to the application of the above stated doctrine. That the principle upon which the deed of an insane person is declared void, in the case of *Dougherty v. Powe*, *supra*, is applicable alike to all contracts of such person, is obvious. It is stated by the court in that case that, "one of the essential elements to the validity of a contract is the concurring assent of two minds. If one of the parties to a contract is insane at the time of its execution, this essential element is wanting. The principle is the same whether the contract rests in parol or be by a deed."

If then the contract of an insane person is void, it would seem to logically follow, that a party contracting with him could not take any benefit under such contract—would get no title to property obtained from such an one.

We have no precedent by our court directly upon the point presented for consideration by the ruling of the court below, and there seems to be conflict in the decisions of courts of other states upon the question.

The case of *Carrier v. Sears*, 4 Allen (Mass.) 336, is cited by appellee in support of the rulings of the court on the demurrers, and it must be conceded that the court's rulings are in full accord with the case. But in Massachusetts, and in the other states, so far as our investigation has revealed, where courts have held that insanity is a personal plea, the ruling has been based upon

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the principle that the contracts of an insane person are voidable and not void. The decision of the case cited above from the Massachusetts court is rested expressly upon that principle.

In the case of *Burke v. Allen*, 29 New Hampshire, 106, it was held that the indorsement of a promissory note by the payee, is a contract which an insane person cannot make, because he has not the power to give that consent which the contract requires, and that in an action upon the note by an indorsee against the maker, insanity in the payee and indorser at the time of the indorsement and transfer is a valid defense.

This same view was taken of the question by the Supreme Court of Michigan in the case of *Hannahs v. Sheldon*, 20 Mich. 278. Cooley, J., delivered the opinion of the court.

There is another line of decisions which hold that the contracts of an insane person are only voidable before such a person is adjudicated insane by a court of competent jurisdiction, but that after such adjudication is had, all contracts made by such person are void.—*Bunn v. Postell*, 107 Ga. 490; *Harvey v. Hobson*, 53 Me. 451; *Eaton v. Eaton*, 37 N. J. L. 108; *Aetna Insurance Co. v. Sellers*, 56 N. E. Rep. 97.

Leaving out of view the decisions of the courts in other jurisdictions, this court having held that the contracts of an insane person are void, and it being true that the transfer of a note of necessity, involves the making of a contract, we think it must follow as a logical sequence, that the transfer of a note by an insane person, must be held to be void. Further, as a payment of a note, such as will operate as an acquittance to the payor, must be made to the person who has authority to receive the payment, the payor may impeach the contract of transfer by showing the insanity of the transferrer at the time the contract was made.

It follows that the court erred in sustaining the demurrer to pleas numbered 4, 5, 6 and 7, but we are of the opinion, and so hold, that plea 8 was subject to the demurrer made to it and the court did not err in sustaining the demurrer to plea 8.

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Under the sworn plea denying that the plaintiff was the party really interested in the note sued on, evidence that the payee of the note was insane at the time he transferred the note was competent and the court erred in excluding such evidence.

The questions presented by the 8th and 9th assignments of error will probably not arise on another trial and we deem it unnecessary to pass upon them here.

The judgment is reversed and the cause remanded.
Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DOWDELL, J.J., concurring.

Baker v. Cotney.

Action for the Conversion of Property.

1. *Action on the case; sufficiency of complaint.*—A count of a complaint which avers that the defendant removed and converted to his own use certain cotton and other farm products which were raised by a tenant of the plaintiff, and upon which the plaintiff had a lien as a landlord, and for advances, and that at the time of so removing and converting said property, the defendant knew of the existence of said lien, and that by said removal or conversion said lien and the remedy for its enforcement were lost to the plaintiff, states a substantial cause of action of trespass on the case.
2. *Action for conversion of property; what question for the jury.* In an action to recover damages for the loss and destruction of a lien in favor of the plaintiff by reason of the defendant's removing certain property and converting it to his own use, where the evidence shows that a certain quantity of the property described in the complaint was delivered at certain designated places for the plaintiff, but there was no definite proof as to the weight of the cotton so delivered, it is for the jury to ascertain whether or not such cotton was sufficient to pay the plaintiff, and, therefore, it was error for the court to instruct the jury that the plaintiff should recover the value of all the property so delivered.

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- 3 *Action for conversion of crops; admissibility of evidence.*—In an action to recover damages for the conversion of cotton raised on lands owned by the plaintiff whereby the lien of plaintiff was lost, where there was evidence tending to show that the cotton in question was grown on plaintiff's land, it is competent for the defendant to show that the cotton may have been grown on other lands; and for this purpose he can ask a witness who testified that he was a farmer and had been cultivating cotton all his life, and knew the land where the cotton in question was alleged to have been raised, how much cotton, in his judgment, did the land in question make; and this is true, although said witness had previously testified that he did not know how much cotton said land in question had made.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. A. H. ALSTON.

This action was brought by the appellee, S. M. Cotney, against the appellant, D. W. Baker, and sought to recover \$375.00 for the taking of certain articles of personal property, which was described in the complaint. The complaint contained three counts. The first count was in trover. The second in trespass, and the third was in case. The third count claimed damages for that the defendant removed, or caused to be removed and converted to his own use four bales of cotton, 600 pounds of seed cotton, 66 bushels of cottonseed, and other farm products; upon which it was averred the plaintiff had a lien as a landlord of D. N. Cotton, L. P. Cotton and J. J. Cotton, and for advances made to them, and of which lien it was averred in said count the defendant had knowledge at the time he removed and converted said cotton and other farm products, and that after said removal the defendant refused to deliver up said property to the plaintiff upon his demand, and that by said removal or conversion, said lien and the remedy for its enforcement were lost to plaintiff.

The defendant demurred to the 3d count of the complaint upon the grounds that it was too vague and indefinite, and that it was not shown thereby that the defendant destroyed the plaintiff's lien on said property described in said count. This demurrer was overruled, and defendant duly excepted.

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The cause was tried upon pleas of the general issue. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court at the request of the plaintiff gave the general affirmative charge in his behalf. There were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved.

D. H. RIDDLE, for appellant, cited, *Snodgrass v. Br. Bank of Decatur*, 25 Ala. 161; *Leeman v. Shackelford*, 50 Ala. 437; *McHan v. Ordway*, 67 Ala. 347.

JAMES W. STROTHER, *contra*—Cited *Harrison v. Palmer*, 76 Ala. 157; *Baker v. Barclift*, 76 Ala. 414; *Waldman v. N. B. & M. Ins. Co.*, 91 Ala. 170; *Adler v. Prestwood & Co.*, 122 Ala. 367; *Seymour & Co. v. Farquhar*, 93 Ala. 292.

ANDERSON, J.—This action was brought by the plaintiff against the defendant for the conversion of the crop or for the destruction of the landlord's lien. The complaint contains three counts, trover, trespass and case. Defendant demurred to the third count and the trial court properly overruled said demurrer.

The plaintiff, S. M. Cotney, rented a certain place known as the "Allen place" for the year 1903, to D. N., L. P. and J. J. Cotney, a brother and the other nephews of the plaintiff, for 2000 pounds of lint cotton, to be delivered on the 1st of November of said year. The evidence showed that defendant got four bales of lint cotton, 590 pounds of seed cotton and 1460 pounds of cotton seed, from the different gins and that it had been left there for plaintiff and delivered there as per his instruction; that defendant also got 872 bundles of fodder and 2440 pounds of hay from the rented premises in the possession of the tenants. The evidence also showed that defendant had knowledge of facts sufficient to put him on notice as to plaintiff's lien for rent. Plaintiff also introduced in evidence a mortgage on certain personal property and the crop to be grown for said year by the

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said tenants and which was signed by each of them. Said mortgage was for \$227.00 and shows several credits which would reduce the amount due to about \$17.00. The plaintiff admitted when testifying that he had received certain payments, hay, corn, etc., and that they had all been credited on said mortgage. He also admitted that the mortgage was *entitled* to a credit of two mules at \$40.00 each. We find credits for mules on the mortgage, but nothing to indicate that they were these two mules at \$40.00 each, and witness does not say they have been credited on the mortgage, but that the mortgage is *entitled* to a credit for same. If the mortgage was entitled to this credit, then it was paid before the suit was brought and could not be used to establish the plaintiff's title to the property in controversy. It would also establish a credit on what was due the plaintiff for rent by an application of the excess thereto after paying balance on the mortgage, and it was a question for the jury to determine if the mortgage had been paid, and if any payment had been made on the rent. If the mortgage was out of the question, then the most that the plaintiff claims is the rent, 2000 pounds of lint cotton and \$31.00 advances.

The evidence shows that four bales of cotton, 590 pounds of seed cotton and 1460 pounds of cotton seed had been delivered at the gins for the plaintiff, but that the hay and fodder had never been delivered, and that plaintiff had but an equitable title thereto, and only that, in case the property delivered was insufficient to pay the rent, 2000 pounds of lint cotton, equal to four bales and the \$31.00 advances. There was no definite proof as to the weight of the cotton, and the court should have left it to the jury to ascertain whether or not it was sufficient to pay plaintiff instead of charging the jury peremptorily that plaintiff should recover the value of all the property.

We are not unmindful of the proposition that the plaintiff could recover the value of the property at any time between conversion and trial and regardless of what was due him. But he could not recover in trover for those things that were never delivered, and upon which he had nothing but a lien and he could not recover even

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in case, as to them, if the other articles paid the plaintiff. The court not only gave the general charge for the plaintiff but instructed the jury to unconditionally include the value of the hay and fodder in their verdict.

The evidence showed that the plaintiff and tenants were all related and that the tenants cultivated and raised cotton on lands other than the Allen land. It is true that the tenants testified that the products in question were grown on the plaintiff's land but evidence was brought out as to the acreage and quantity of land in cotton on the different tracts and it was legitimate for the defendant to show that the cotton may have been grown on other land; that the Allen land did not produce so much and that this cotton, or some of it, may have been grown on the other land. Plaintiff examined witness, Ham, who testified upon cross-examination, "I saw the land that was in cotton on the Allen place last year, I am a farmer, raised on the farm. have been cultivating cotton all my life." Defendant's counsel then asked: "How much did that land make per acre last year, from your best judgment, from the appearance of the stalks and the number and size of the bolls?" The court sustained an objection to this question and then asked witness, "Ham, do you know how much cotton it made?" Witness said, "I do not." Defendant then asked: "In your best judgment, what did it make?" The court sustained an objection to this question. The court erred in sustaining the objection. The witness was an expert farmer and could have given his opinion as to the amount of cotton produced on the land. Experts can testify to opinion and there are many questions upon which a non-expert may express his judgment or opinion. *Pollock & Co. v. Gantt*, 69 Ala. 373. The fact that the witness answered negatively the question propounded by the court, did not cure the objection. The witness doubtless could not tell exactly what the land made, yet he could have given it as his opinion that it made less than four bales or less than one, and which would have been contradictory evidence as to the plaintiff's lien or title to the cotton in question. There was also evidence that plaintiff had gotten about fifty bushels of corn off the land, and while the mortgage shows a credit for corn,

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it does not give the amount and the jury ought to have ascertained whether or not credit had been given for all the corn he got.

There are numerous assignments of error, but we do not deem a discussion of any of the others necessary.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

Hawkins v. Hawkins.

Bill in Equity to have Annulled the Marriage Contract.

- 1 *Marriage; when license not properly issued, and does not authorize solemnization of marriage.*—While the statutory duty of a judge of probate to issue marriage licenses is ministerial, it is nevertheless a duty involving official and personal discretion, and cannot be delegated to another not authorized by statute to exercise such duty; and therefore, where marriage licenses are signed in blank by a probate judge, and delivered to a justice of the peace with directions to fill in the blanks as occasion may arise, the issuance of such licenses by the justice of the peace filling in the names of the parties, and date of its issuance does not constitute a valid marriage license, and furnishes no authority for the solemnization of the marriage between the parties named therein.
2. *Same; invalid when without license not followed by co-habitation.*—A marriage solemnized by a justice of the peace without a valid license, and which is not followed by co-habitation, is not valid either as a statutory or common law marriage.
3. *Marriage; jurisdiction of chancery court to annul marriage contract; duress.*—Where a party is by duress coerced into entering into marriage and the marriage ceremony is had under the supposed authorization of a marriage license, which license was invalid, and there has never been any co-habitation of the parties as man and wife after the ceremony, the person so coerced to enter into such marriage can maintain a bill to have annulled and declared void such pretended marriage.

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APPEAL from the City Court of Anniston.

Heard before the Hon. THOMAS W. COLEMAN, JR.

The averments of the bill in this case are sufficiently set forth in the opinion.

The prayer of the bill was that upon final hearing the alleged pretended marriage between the complainant and the respondent be declared null and void, and that the complainant be allowed to marry if he so desired.

The respondent moved to dismiss the bill upon the following grounds: 1st. That said bill is without equity. 2nd. That the allegations of fact contained in said bill do not constitute any equitable ground for the severance of the marriage bonds between complainant and respondent.

Respondent also demurred to the bill upon several grounds, which may be summarized as follows: 1. The facts averred in the bill do not show any legal duress sufficient to authorize the court to maintain the present bill. 2. The complainant having married the defendant as a means whereby to procure his release from prosecution from the charge of seduction, thereby estopped himself from coming into the court of equity to have said marriage annulled. 3. The facts averred in said bill constitute no sufficient ground of legal duress, and fail to show whereby the complainant was in anywise forced to enter into said marriage. 4. The facts averred in the bill show the marriage license issued to complainant and defendant was issued in a legal and lawful manner.

On the submission of the cause upon the motion to dismiss the bill and upon the demurrers, the chancellor rendered a decree overruling said motion, and the demurrers. From this decree the respondent appeals and assigns the rendition thereof as error.

BLACKMON & GREENE, for appellant.—To constitute legal duress which would avoid a marriage, it does not suffice that the party exhibiting the bill for such purpose, married unwillingly; he must have been forced by fear of bodily harm, so to do.—14 Amer. & E. Enc. of Law, (1st ed.), p. 510; *Stevenson v. Stevenson*, 7 Phila. 386. It is not duress, when a man marries a woman after seducing her to avoid trouble with the overseers of the poor.

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14 Am. & Eng. Enc. of Law, (1st ed.), p. 510; *Jackson v. Winne*, 7 Wend. (N. Y.), 47 to 51.

The appellee having married the appellant to procure his release from the prosecution alleged in said bill, 'cannot now say that his marriage was involuntary.—*Williams v. State*, 44 Ala. 24.

TATE & WALKER, *contra*.—That a court of chancery has cognizance of such cases without statutory provisions, and the power to decree a marriage, void in its inception, to be so, is certainly beyond the peradventure of doubt. Our court has recognized and followed the English practice.—*Rawdon v. Rawdon*, 28 Ala. 565-567; *Ridgely v. Ridgely*, 25 L. R. A. 804; *Stewart on Marriage & Divorce*, §§ 139-140; *Bishop on Marriage & Divorce*, § 226.

It is held in Alabama that the issuance of marriage license is not only ministerial but that it involves discretion, both official and personal, such as the law does not allow to be delegated to another not specifically authorized by statute to exercise it.—Code 1896, § 3372 Acts, 1892-93, p. 1190; *Ashley v. State*, 109 Ala. 48; *Beggs v. State*, 55 Ala. 108.

McCLELLAN, C. J.—Bill filed by Milton Hawkins against Bella Hawkins. Its averments present this case: Milton was under arrest and about to be tried preliminarily on the charge of having seduced Bella. He was innocent of the charge. He was young, a mere boy, and inexperienced. It was proposed to him to dismiss the prosecution and set him at liberty if he would marry the girl. He was advised by the magistrate before whom he had been brought and his trial was to be had that it would be best for him to do this. Thus environed, and pressed and advised, he consented to marry. Thereupon a ceremony of marriage was performed between him and the girl by said magistrate. This ceremony was had under the supposed authorization of a paper in form a marriage license, but which had no legal status as such, having been in part issued by the magistrate himself by filling in the names and date of a license form which had been signed in blank by the judge of probate. There has

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never been any cohabitation of the parties as man and wife, nor sexual intercourse since—or even before—the ceremony. Leaving out of view the duress, this was no marriage: The formal apparent solemnization was without license, and hence inefficacious as a statutory marriage; and the formal consent to be man and wife was not consummated into that relation under the common law by cohabitation.—*Ashley v. State*, 109 Ala. 48.

We are of opinion that the chancery court—of course wholly without reference to its statutory jurisdiction to grant divorces—has power to declare the nullity of the performance as a marriage. Had there been a valid license the jurisdiction of chancery to annul the marriage under it is undoubted, being indeed the general jurisdiction of that court to annul contracts into which the complaining party has been coerced to enter. So, too, this jurisdiction would exist to that end had the complainant, moved thereto by the contract he had made under duress, consummated the agreement by cohabitation, assuming there was no statutory marriage. And though there was no license and has been no consummation, the contract of marriage—the undertaking to cohabit—is still extant, so to speak, and nominally subsisting and binding. The marriage might yet be consummated, and such consummation might well result from the moral, or supposed legal constraint of the contract which itself was the product of *duress per minas*. Under these circumstances, the complainant, we think, is entitled to invoke the jurisdiction of chancery to annul contracts induced by duress to a declaration of the nullity of this contract and of the consequent marriage, though only ceremonial. Without resting the jurisdiction at all upon that consideration, the fact that the license is regular and valid on its face, and the fact that a formal ceremony had been with apparent authority certified to the judge of probate, demonstrate the practical importance to the complainant of the relief he seeks. The jurisdiction attaching on the ground of duress, “the fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, [though no marriage in legal contemplation] is very apparent, and is equally conclusive to

[*Ensley Mercantile Co. v. Otwell.*]

good order and decorum, and to the peace and conscience of the party."

The bill has equity. It is not open to the objections taken by the demurrer. The decree of the city court overruling the motion to dismiss the bill for want of equity and the demurrer must be affirmed.

Affirmed.

TYSON, SIMPSON and ANDERSON, J.J., concurring.

Ensley Mercantile Co. v. Otwell.

Action for Alleged Negligent Killing of Horse.

1. *Contributory negligence; not shown by merely violation of law.*
It is not contributory negligence *per se* for a person who is injured to be engaged at the time of the injury in a violation of law; but before an illegal act or omission can be held to be contributory negligence, it must appear that such act or omission was a proximate cause of the injury.
2. *Pleading and practice; variance cannot be raised first time on appeal.*—A question of variance between the allegations of a complaint and the testimony introduced at the trial of a case cannot be raised for the first time on appeal.

APPEAL from the City Court of Birmingham.

Tried before the Hon. CHARLES A. SENN.

This action was brought by the appellee, J. A. Otwell, against the appellant, the Ensley Mercantile Company, a corporation, and sought to recover damages for the alleged negligent killing by the defendant, through its agent, of a mare that was owned by the plaintiff. The defendant pleaded the general issue, and by special pleas set up the contributory negligence on the part of plaintiff.

It was shown by the evidence that the plaintiff's mare which was killed was running at large in the streets of the city of Ensley; that the delivery wagon of the Ensley Mercantile Co. was being driven down one of the streets, which ran at right angles with the street on which plaintiff's mare was loose; that said wagon turned

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the corner and the wagon ran into the plaintiff's mare, causing the injuries from which she died; that there was a driver in the wagon at the time of the accident. It was also shown that there was an ordinance of the city of Ensley, prohibiting horses or other animals from running at large on the streets of Ensley.

The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence, the court made a special finding, the substance of which is stated in the opinion. Upon this finding the court rendered judgment in favor of the plaintiff.

The defendant appeals and assigns as error the rendition of the judgment in favor of the plaintiff.

ROMAINE BOYD, for appellant.—The plaintiff was guilty of contributory negligence.—*A. G. S. R. R. Co. v. Arnold*, 80 Ala. 600; *A. G. S. R. R. Co. v. Dobbs*, 101 Ala. 220. In order to recover plaintiff must show that defendant was guilty of negligence after discovering the danger. *Ga. Pac. R. R. Co. v. Lee*, 92 Ala. 271; *Tanners Exrs. v. L. & N. R. R. Co. v. Brown*, 121 Ala. 221; *Cent. of Ga. v. Lamb*, 124 Ala. 172; *M & C. R. R. Co. v. Martin*, 30 So. Rep.

MCKENZIE & JONES, *contra*.

HARALSON, J.—The question in this case is one of repeated discussion in this and other courts.

The court, trying the case without a jury, found that the plaintiff allowed his mare to run at large on the streets of the city on the occasion she was injured and killed; that defendant was not guilty of any negligence after discovering plaintiff's mare in the street; that the defendant company was guilty of negligence in driving as it did just previous to discovering the mare; that this negligence was the proximate cause of the injury; that the defendant was guilty of negligence in not discovering the mare before he did, and this negligence was the proximate cause of the injury.

This was in effect holding, as was proper, that contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury.—7 Am. & Eng. Ency. Law, (2nd ed.), 373.

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"It is not contributory negligence *per se* for the injured person, at the time of the injury, to be engaged in a violation of law, either positive or negative in its character. Before an illegal act or omission can be held contributory negligence, it must appear that such act or omission was a proximate cause of the injury. It is usually held that the mere collateral wrong doing of the plaintiff cannot of itself bar him of his action when it did not proximately contribute to the injury."—7 Am. & Eng. Ency. Law, (2nd ed.), 401.

In *A. G. S. R. R. Co. v. McAlpine*, 71 Ala. 549, where it was insisted that the plaintiff was guilty of an unlawful act in suffering his stock to run at large, and that this debarred his right of recovery, it was said: "The rule, however, is, that 'to deprive a party of redress because of his own *illegal* conduct, the illegality must have *contributed to the injury*.'—Cooley on Torts, 155. The fact of illegality here renders the act of permitting the stock to run at large neither more nor less *contributory* to the injury, or *proximate* as a cause of it. Wharton on Negligence, §§ 995, 331. The relation of the act to the injury complained of would be precisely the same, whether it was legal or illegal. It would have no more tendency to produce the injury in the one case than in the other. This is the better and sounder rule recognized in the case of injuries or accidents happening in the violation of Sunday laws."—*A. G. S. R. Co. v. Powers*, 73 Ala. 245; *S. & N. A. R. Co. v. Williams*, 65 Ala. 74.

In *L. & N. R. Co. v. Kelsey*, 89 Ala. 290, a case where a horse escaped from the car in which he was being transported, ran several miles along the public road until it intersected the railroad track, and up the latter track for nearly a mile, when it was overtaken by another train of cars, was run over and killed,—it was said: "However the horse came to be at large, the mere fact that he was allowed to go at large, was not the direct, moving and proximate cause of his death, and the fact of negligence *vel non* in allowing him to be at large, is one with which the jury has no concern, since no determination of that issue, could have defeated a recovery on the one hand, or increased plaintiff's damages on the other."

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The complaint alleged the place of the injury to have been "upon a certain public highway in the village of Averyts, in the said county of Jefferson." Mrs. Otwell described the place of the accident, as being near her husband's store on Avenue J, in Averyt's Town or in Ensley."

The driver of the wagon that killed the mare, testified that as he was driving down Avenue J, which lies at right angles to 19th street in the city of Ensley, Alabama, and as he turned the corner of Avenue J. into 19th street, he looked ahead and saw the plaintiff's mare for the first time, standing in the middle of the street. Whether Averyts referred to in the complaint was not a part of Ensley, was a question for the court trying the case without a jury. It was clearly a matter of inference, that Averyts was a well known part of Ensley. Furthermore, no question of variance between the allegation and proof was raised in the court below, and it cannot be entertained for the first time on appeal.—22 Ency. Pl. & Pr. 8, 24; *Ferguson v. George*, 42 Ala. 135; *McAbec v. Parker*, 78 Ala. 575; *Pears v. Thompson*, 82 Ala. 294.

Under the evidence in the cause, the court very properly rendered a judgment for the plaintiff.

Affirmed.

McCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

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Bill in Equity by Stockholder for the Removal of Directors, the Appointment of Receivers and Dissolution of Corporation.

- 1 *Corporation; when directors should not be removed or receiver appointed.*—Where a bill is filed by a stockholder of a corporation, complaining of malfeasance and mismanagement on the part of certain directors, and asking that such directors be

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removed from the management of the affairs of the company and be enjoined from exercising any of the powers of stockholders or directors, and for the appointment of a receiver for the corporation, and a dissolution of the corporation, and it appears from the bill that the business of the corporation was not confined to the execution of the contracts and transactions in which it was alleged the said designated directors were unfaithful to the corporation's interest, and it is not shown that said directors have any adverse interest in such independent business, nor does it appear that there is any mismanagement of the corporation in relation to the same, there is shown no ground for the appointment of a receiver or for removing said directors from the management of the affairs of the company, or restraining them from exercising powers as stockholders or directors of the corporation.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. THOMAS H. SMITH.

The bill in this cause was filed by the appellant, Harry G. G. Donald, against the Manufacturers' Export Company, a corporation, and J. T. McKeon, William McGee, J. E. North, W. J. Kilduff, H. L. Glover, and David Baird. The purpose of the bill and the facts averred therein are sufficiently set forth in the opinion.

The respondents demurred to the bill on the following grounds:

"First. Because the bill of complaint does not show that any proper application was made to the Board of Directors, assembled as such, to remedy the grievances complained of in the bill. Second. Because the bill of complaint does not show that any proper application was ever made to a meeting of the stockholders, as such to remedy the grievances complained of in the bill of complaint. Third. Because the bill of complaint shows that the Manufacturers' Export Company was organized largely for the purpose of dealing with the Baird Lumber Company, the Bay City Lumber Company, and the J. E. North Lumber Company, and that it was the purpose of the organizers of the said Manufacturers' Export Company to so distribute its stock that those principally interested in said several lumber companies should hold and control a majority of the stock of said corporation, and that the complainant was one of the promoters of the

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Manufacturers' Export Company and consented to and participated in such purpose. Fourth. Because said bill of complaint shows that the several contracts which it alleges existed between the Manufacturers' Export Company and the said several lumber companies, were separate and distinct contracts with each of the said several lumber companies, and that there were no joint contracts or dealings between the Manufacturers' Export Company on the one part, and said three lumber companies on the other part, and said bill further shows that only one of the directors of the Manufacturers' Export Company is interested in the Bay City Lumber Company and that only one of said directors is interested in the J. E. North Lumber Company, and that only two of said directors are interested in the Baird Lumber Company. Fifth. Because said bill of complaint shows that there are five directors of the Manufacturers' Export Company, and only one of said directors is in any wise interested in the Bay City Lumber Company, and only one in any wise interested in the J. E. North Lumber Company, and only two in any wise interested in the Baird Lumber Company. Sixth. Because the bill of complaint fails to set out the terms of the several contracts between the Manufacturers' Export Company and the several lumber companies mentioned in the bill of complaint, and fails to set out the facts showing wherein said lumber companies, respectively, violated said several contracts, and fails to allege any facts showing to what extent the Manufacturers' Export Company suffered damage by its failure to enforce said contracts, and fails to allege that the salaries drawn by the several officers of the Manufacturers' Export Company were not fairly fixed by the company before the services were rendered. Seventh. Because the bill of complaint alleges that the Manufacturers' Export Company is engaged in business with others than said several lumber companies, and does not show that any of the directors have any conflicting interest in any of such other dealings or are otherwise disqualified to conduct the same. Eighth. Because the bill of complaint shows that with the consent of the complainant, the Manufacturers' Export Company was so organized that it could not fairly and properly

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deal, through its stockholders or board of directors, with the several lumber companies mentioned in the bill of complaint, and yet complains that such directors did not insist upon dealing with said several lumber companies. Ninth. Because the bill of complaint is a bill filed by a single stockholder seeking to dissolve the corporation because the mismanagement of its affairs by a majority of its directors. Tenth. Because the chancery court has no jurisdiction to dissolve a corporation and wind up its affairs, otherwise than in the statutory method.

The said defendants demur to so much of said bill of complaint as seeks to direct that J. T. McKeon, William McGee, and J. E. North may be removed from the management of the affairs of the company, and restrained and enjoined from exercising any power, either as stockholders or directors thereof. First. Because the court has no authority to restrain a majority of the stockholders or directors of the company from exercising the powers vested in them by law as stockholders and directors because they may have improperly or unwisely acted in regard to one or more matters touching the corporate affairs. Second. Because the bill of complaint shows that the said defendants constitute the holders in value of a majority of the stock of said corporation, and that they are not more disqualified to act as stockholders and directors than are David Baird and H. L. Glover, and that, without any of said stockholders participating in the board of directors, there would not be a sufficient number of stockholders to constitute a board of directors of said company.

The said defendants demur to so much of said bill of complaint as seeks the appointment of a receiver of said corporation, because there are no allegations in the bill of complaint showing that the assets of the company are being in any manner misapplied by its board of directors. Second. Because the bill of complaint contains no allegations showing any reason why the affairs of the company should be taken out of the hands of the stockholders and directors.

The said defendants demur to so much of said bill of complaint as seeks to have a receiver authorized and instructed to demand and if necessary, sue for, any and

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all sums due to the Manufacturers' Export Company from the Bay City Lumber Company, the J. E. North Lumber Company, and the Baird Lumber Company, or any of them. First. Because there are no allegations in the bill of complaint showing that anything is due by any of said several lumber companies to the said Manufacturers' Export Company. Second. Because the said bill of complaint does not sufficiently set out the several contracts alleged to have existed between the Manufacturers' Export Company and the several lumber companies, nor the facts in regard to the dealings under said contracts, sufficiently to enable the court to see whether there is a liability under said contracts or not.

On the submission of the cause upon the demurrers, the chancellor rendered a decree sustaining them. The complainant refused to amend the bill, submitting the cause on the original bill alone, and the chancellor rendered a final decree dismissing the bill.

The complainant appeals and assigns as error the decree overruling the demurrers to the original bill and the decree dismissing the bill.

FITTS & STOUTZ, for appellant.—Cited *George v. Central R. R. & B. Co.*, 101 Ala., 608. 624; *M. & C. R. R. v. Woods*, 88 Ala., 647; *Perry v. Tuscaloosa C. S. O. M. Co.*, 93 Ala. 368; *O'Connor M. & M. Co. v. Coosa F. Co.*, 95 Ala. 618; *Dexter v. McClellan*, 116 Ala. 37.

GREGORY L. & H. T. SMITH, *contra*.—Cited *L. & N. R. R. Co., v. Neil*, 128 Ala. 156; *Cook on Corporations*, Vol. 2, § 739; *Nicrosi v. Calera Land Co.*, 115 Ala. 434; 2 *Cook on Stock*, § 275; *Bridgeport Co. v. Tritch*, 110 Ala. 285.

TYSON, J.—It appears from the bill in this case that complainant is a shareholder in the Manufacturers' Export Company. The corporation had contracts with the Bay City Lumber Company, the Baird Lumber Company, and the J. E. North Lumber Company, for the sale of the products of the saw mills of said companies with the exception of such portion thereof as might be sold by said companies in their local market.

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The contract provided that the Manufacturers' Export Company should receive a commission of 5 per cent on the amount of sales made by them. And it is averred that the profits from these commissions would approximate twenty thousand dollars per year. These contracts remained in force until the 7th day of July, 1902, "when they were in form rescinded, or pretended to be rescinded by the board of directors of said companies, by and with the consent of the officers of said three saw mill companies." It appears that said rescission was accepted for the Bay City Lumber Company by J. T. McKeon, for the J. E. North Lumber Company, by J. E. North, and for the Baird Lumber Company, by William McGee. At the time of the rescission McGee was the general manager of the Baird Lumber Company and a stockholder therein, North was the president of the J. E. North Lumber Company and a stockholder therein, and McKeon was a stockholder and an officer of the Bay City Lumber Company. All three were members of the board of directors of the Manufacturers' Export Company, composed of five members, and voted for the rescission. It does not appear that the rescission was opposed by the other members of the board. It appears that during the first year of the existence of the company, the mill companies began to handle their sales through other sources than the Manufacturers' Export Company. Notwithstanding this fact, it appears that during the first year's business, the profits of the company aggregated nearly one hundred per cent on the paid in capital stock. It appears that during the second year's business, the company lost money, "though had said mill companies stuck to their contracts, it would have made money, notwithstanding said loss." Complainant was the manager of the export department of the company from the time of its organization, about the 19th day of September, until the 31st day of October, 1901, when he was discharged. During the second year and after complainant's discharge, the management of the business devolved upon McKeon, as president, and McGee as its treasurer, but the bill avers that other business engaged McKeon and McGee the greater portion of their time, and in consequence, the business of the company was "without their valuable services."

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It is averred that the business of the company did not suffer by reason of this fact because of active management devolving upon a bookkeeper who was paid a salary of \$1800.00 per year, admitted not to have been unfair. It further appears that during all this time, while the business was practically managed by the book-keeper, McKeon and McGee, president and treasurer, continued to draw from the company salaries of \$3000.00 and \$2500.00 per annum, respectively, which it is averred was grossly excessive, and that the salaries were unearned, the latter fact being admitted by McKeon and McGee at a stock meeting of the stockholders on the 7th day of July, 1902. On June 30th, 1902, complainant addressed a letter to each of the members of the board of directors in which he demanded that the contracts between the company and the three mill companies be enforced, and protested against the payment of fancy salaries to the officers of the company who performed nominally or no services therefor. He required that action be taken at the approaching annual meeting to collect all sums of the company, and the letter contained a notice that unless complainant's demand was complied with, he would file a bill in equity for the purpose of having a receiver appointed who would enforce such claims against said companies, and for the protection against said unearned salaries. It appears that North, McKeon, McGee, and Baird owned all but 27 1-2 shares of the 125 shares constituting the capital stock of the company. At the meeting of the shareholders on July 7th, 1902, the president, McKeon, suggested the postponement until 7 o'clock of the same day. It was between the postponement and the hour appointed that the board of directors held a special meeting and rescinded the contracts with the saw mill companies.

The prayer of the bill is that McGee and North be removed from the management of the affairs of the company, that they be enjoined from exercising any power as stockholders or directors, for the appointment of a receiver to collect all sums due the company from the three mill companies, and the unearned salaries of McKeon and McGee, and that the company be dissolved and the assets distributed.

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Demurrers were interposed to the bill which were sustained, and complainant refused to amend, submitted upon the original bill alone, and a final decree was rendered dismissing the bill.

It is unnecessary to consider whether the complainant could file the bill in his own name, for if this fact be conceded, complainant was not entitled to relief.

If the contracts with the three mill companies were fraudulently rescinded, complainant upon a proper predicate being shown may file a bill in his own name, in behalf of the corporation for the enforcement of its rights thereunder. So too, if the directors have in abuse of their trust paid to themselves unreasonable salaries as officers of the corporation, complainant has like rights and remedies.—*Alabama Coal & Coke Co. v. Shackelford*, 137 Ala. 224.

It appears from the bill that the business of the corporation is not confined to the execution of the contracts with the three mill companies. It is not shown that the directors have any adverse interest in such independent business, nor does it appear that there is any mismanagement of the corporation in relation to the same. Under such circumstances, it certainly cannot be said that the assets and business of the corporation are imperiled, necessitating the intervention of the court of chancery for the appointment of a receiver. Nor for the same reason is there sufficient ground why the respondents should be removed from the management of the affairs of the company or restrained from exercising powers as stockholders or directors thereof. The remedy of complainant, as is stated above, is to redress the wrongs complained of in the name of the corporation.

The demurrer to the bill was well taken and the decree of the chancery court must be affirmed.

Affirmed.

McCLELLAN, C. J., SIMPSON and ANDERSON, J. J., concurring.

[Hutcheson v. Bibb *et al.* and Bibb, *et al.* v. Hutcheson.]

Hutcheson v. Bibb *et al.* and Bibb *et al.* v. Hutcheson.

*Bill in Equity to have Declared Void a Will and Deeds
of Conveyance.*

- 1) *Undue influence; as to transactions inter vivos.*—In transactions *inter vivos* where confidential relations exist between the parties, the law raises up the presumption of undue influence, and when the donee is the dominant party in the transaction, the burden is upon him of repelling such presumption by competent and satisfactory evidence; which is usually done by showing that the grantor had the benefit of competent and independent advice of some disinterested third party.
- 2) *Undue influence as relating to testamentary transactions.*—In transactions testamentary in character, the mere existence of confidential relations between the debtor and the beneficiary under the will, are not in and of themselves alone sufficient to raise presumption of undue influence in the making of the will, that would avoid it in the absence of rebutting evidence; but undue influence such as will avoid a will must amount to fraud or coercion so as to show that the will as executed was not as a matter of fact the will of the testator.

APPEAL from the City Court of Montgomery in Equity.
Heard before the HON. A. D. SAYRE.

The facts in this case are sufficiently stated in the opinion.

MARKS & SAYRE and J. M. CHILTON, for Mrs. Hutcheson. Cited *Thompson et al. v. Johnson*, 19 Ala. 59; *Gilham v. Mustin*, 42 Ala. 365; *Traywick v. Davis*, 85 Ala. 342; *Abney v. Moore*, 106 Ala. 131; *Robinson v. Moseley*, 93 Ala. 78; *Moog v. Barrow*, 101 Ala. 209-212; *Noble's Admr. v. Moses Bros.*, 61 Ala. 530-550; *Waddell v. Lanier*, 62 Ala. 347; *Ferguson pro ami v. Lowery*, 54 Ala. 510; *Malone v. Kelly*, 54 Ala. 432; *Holt v. Agnew*, 67 Ala. 368; *Wheeler v. McCreary*, 64 Ala. 327; *Kerr in Fraud*, pp. 151-3, 183; *Bancroft v. Otis*, 91 Ala. 283.

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GUNTER & GUNTER, *contra*.—Cited *Gilbert v. Gilbert*, 22 Ala. 529; *Taylor v. Kelly*, 31 Ala. 59; *Adair v. Craig et al.* 33 So. Rep. 902; *Jackson v. Rowell*, 87 Ala. 685; *Rancroft v. Otis*, 91 Ala. 279; *Henry v. Hall*, 106 Ala. 95; *Mackall v. Mackall*, 135 U. S. 167; *Townson v. Moore*, 173 U. S. 23.

DOWDELL, J.—The bill in this case was filed by Mrs. Sallie E. Hutcheson for the purpose of setting aside and annulling the last will and testament of Miss Louisa S. Bibb, deceased, and, also, certain deeds of gift executed by said Louisa S. Bibb during her life-time to Mrs. Martha D. Bibb.

The ground alleged in the bill for avoiding the said will and deeds, is undue influence exercised by the said Martha D. Bibb, the grantee in the deeds and the principal beneficiary under the will, over the said Louisa in the making and execution of the same. Mrs. Martha D. Bibb in her answer, denies all the material allegations of the bill in regard to the charges of undue influence.

The cause was submitted for final decree upon the pleading and evidence, and a decree was rendered granting the relief sought, as to the deed executed by the said Louisa to the said Martha D., on the 16th day of January, 1902, annulling and avoiding the same, and denying relief as to the said last will and testament, and as to the other deeds; one executed on the 27th day of May, 1887, and the other on the 20th day of November, 1889. From this decree the direct and cross appeals are prosecuted.

In respect to the question of undue influence arising from confidential relations as affecting the validity of deeds and wills, the courts have made a distinction between transactions *inter vivos*, and transactions of a testamentary character. In transactions *inter vivos*, where confidential relations exist between the parties, the law raises up the presumption of undue influence, and puts upon the donee, when the dominant party in the transaction, the burden of repelling such presumption by competent and satisfactory evidence; and this is usually done by showing that the grantor had the benefit of competent and independent advice of some disinterested third party.

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In transactions testamentary in character, the mere existence of confidential relations between the testator and the beneficiary under the will, are not, in and of themselves alone sufficient to raise the presumption of undue influence in the making of the will that would avoid the will in the absence of rebutting evidence. This subject was gone over at length in *Bancroft v. Otis*, 91 Ala. 279, where many cases bearing on the question are cited and reviewed. There must be something more to avoid the will, such as fraud or coercion. As was said in *Bancroft v. Otis*, *supra*; "The undue influence which will avoid a will must amount to fraud or coercion; ideas which involve actual intent to control the testator against his will. The law never presumes fraud or the evil intent and unlawful acts essential to the coercion here contemplated. There must be some proof of these things. They cannot be considered to have been done, merely because the proponent had the power to coerce. Undue influence with respect to gifts and conveyances *inter vivos* is a very different matter. It may exist without either coercion or fraud. It may result entirely from the confidential relation, without activity in the direction of either coercion or fraud, on the part of the beneficiary occupying the position of dominant influence. It is upon him not only to abstain from deceit and duress, but to affirmatively guard the interests of the weaker party, so that their dealing may be upon a plane of equality and at arms length. To presume undue influence in such a case, therefore, is not to presume fraud or coercion, or any act which is *malum in se*, but simply the continuance of the influence which naturally inheres in and attaches to the relation itself." The doctrine is, that in addition to the relations between the testator and the beneficiary under the will, in order to put the burden of upholding the validity of the will upon the beneficiary, when assailed on the ground of undue influence, there must be some evidence of coercion in its execution, or in other words that the will is not the will of the testator. This may be done by showing that the person, who is the principal or a large beneficiary under the will actively participated in the preparation or execution of the will. —*McQueen v. Wilson*, 131 Ala. 606.

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The rule in such cases, is based upon grounds of public policy, and was never intended to deprive one of the right of a voluntary and untrammelled disposition of his own property, but rather to guard and protect that right. It is in effect a rule of evidence putting upon the dominant party in confidential relations claiming a benefit under the transaction, the burden and duty of rebutting and overcoming the *prima facie* case so made by the presumptions which the law raises. But we need not pursue this discussion any further, as the real question in the present case is one of fact, and what we have said is sufficient for a proper determination of the case.

Many witnesses were examined on both sides, relative to the relations of the respondent and the said Louisa S., and as to their respective characters, dispositions, etc., directed to the question of undue influence *vel non*, as charged in the bill and denied in the answer.

The respondent, Martha D. Bibb and Miss Louisa S. Bibb were sisters; they had lived together the greater part of their lives in the same house, their devotion to each other was unmistakable and pronounced. For many years the respondent as the agent of her sister, to a great extent, looked after and managed the business interests of her sister, in the renting of her property as well as in other respects. All of this the evidence clearly shows. The evidence, however, is in conflict as to which of the two sisters was the dominant spirit in their social and business relations. Witnesses testifying on both sides as to this, differed in their opinions and judgments respecting their characters in this particular, both being shown, however, to be women of remarkable culture and attainments.

We will desist from any attempt to here review in detail the mass of testimony contained in the record, as in our judgment to do so, would necessarily prolong this opinion without subserving any good purpose. Under the rule of law stated, the learned judge that tried this case below reached the conclusion on the facts that the respondent was a person in confidential relations with the said Louisa S., during the time covered by the different transactions assailed, and that as the deed of gift of January 16th, 1902, she had failed by competent and sat-

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isfactory proof, to meet and overcome the presumption of undue influence raised by the law, arising out of their said confidential relations existing at the time of said transaction. A different conclusion, however, on the facts, was reached as to the deeds of May 27th, 1887, and of November 20th, 1889, and as to the last will and testament and codicils. In respect to these transactions the learned judge, who tried the case, held that the imputation of undue influence had been sufficiently met and overcome by proof of intervening, competent and independent advice, moreover, that the deeds of May 27th, 1887, and November 20th, 1889, were subsequently confirmed by the will and codicil.

After a careful review and consideration of all the evidence, we are unable to see any reason for differing from the learned judge in his conclusions on the facts, and his decree, therefore, must be affirmed as to both appeals.

Affirmed.

MCCLELLAN, C. J., HARALSON and DENSON, J. J., concurring.

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Bill in Equity to Redeem Lands sold under Execution.

1. *Redemption; right personal, and will be as required by statute.*

The right of redemption, as given by the Statute, is a personal privilege, and in order for one to avail himself thereof, it must be shown that he has not failed to do what the law requires in order to invest himself with the right which he seeks to enforce; or he must show some valid reason for his failure therein in any particular.

2. *Redemption; tender of purchase money and lawful charges;*

excused when purchaser absent from the State.—Where one seeks to exercise the right of statutory redemption, and the purchaser at the mortgage or execution sale is absent from the State, a tender, to be sufficient to authorize the maintenance of a bill in equity for redemption, must be made by a deposit of the money in court upon the filing of the bill; and the

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absence of the purchaser or his vendee from the State excuses the tender in person and authorizes the filing of the bill.

3. *Same; when failure to deliver possession no bar to redemption.*

Where property is purchased at a foreclosure sale of a mortgage, or under an execution levied thereon, and the purchaser at said sale makes no demand for the possession of the property, such failure to demand possession constitutes a valid reason for former owner failing to deliver possession to the purchaser; and, under such circumstances, the failure to deliver possession constitutes no bar to the exercise of the right to statutory redemption.

4. *Bill to redeem; when statutory requirements sufficiently complied with.*—In a bill filed to redeem lands from a sale under

an execution, where it is averred that the purchaser has absented himself from the State, that the complainant has made diligent inquiry to ascertain his post office address, has repeatedly written to him asking for an account of the lawful charges claimed by him to have been paid, has requested his vendees to inform him what lawful charges are claimed by them; and that the original purchaser and his vendees has each refused to give any information; and that the complainant has made diligent inquiry as to the lawful charges, and has paid into court the amount of all lawful charges he has been able to ascertain, and offers to pay all other lawful charges which may be ascertained by the court: such averments show a sufficient excuse for failure of the complainant to pay the lawful charges, and authorize the maintenance of a bill to redeem.

5. *Bill to redeem; sufficiency of averments as to tender of lawful*

charges.—On a bill to redeem property sold under execution, where it is averred that the complainant has ascertained that the purchaser at said sale had paid designated amount as a tax levied by the city wherein the property was located, which said amount "is herewith tendered and offered to said defendant, as well as the further sum of \$41.76, legal interest on the amount of said assessment," such averment of tender is not sufficient: in that, it fails to aver that the amount is paid into court—it appearing that the purchaser is absent from the State.

6. *Statutory right of redemption; where lands are purchased by*

several parties, tender not required to be made to each of the purchasers.—Where property is sold under execution, and the purchaser at said sale subsequently sells separate portions of said property to two or more other parties, in order for the original owner to redeem the lands so sold, it is not necessary that he should make a tender of the purchase price, together with the other charges fixed by the Statute, to the original

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purchaser and each of his vendees; but, under such circumstances, the defendant, by redemption, can come into equity by paying into Court the money which the law requires, and ask the Court to distribute it to the parties according to their respective interests and rights, and offer to do and pay whatever more additional thereto may be just and equitable; and upon such averments and offer, he can maintain a bill to redeem.

7. *A bill to redeem; sufficiency of offer to pay for execution of deed.*
Where a bill is filed in a court of equity seeking to redeem lands sold under execution, and the complainant offers to pay all lawful charges, and asks for information as to their amount, the cost of executing a deed will be considered as included in complainant's offer to do equity.

APPEAL from the Chancery Court of Morgan County.
Heard before the Hon. WILLIAM H. SIMPSON.

The bill in this case was filed by the appellee, R. B. White, as the administrator of the estate of C. C. Sheats, deceased, against the appellants, W. R. Francis, Foster H. Pointer and Nelson Campbell, for the purpose of exercising the statutory right of redemption of certain lands.

It was averred in the bill that executions were issued against the said C. C. Sheats, and were levied upon certain specifically described lands; that said lands were sold under said execution, and the said W. R. Francis became the purchaser thereof, and the sheriff executed a deed to said Francis for said lands. The sixth paragraph of said bill relating to the possession of said lands by said Sheats is copied in the opinion.

It was then averred in the bill that the said Francis had made no improvements on said lands, so far as the complainant knew; that the complainant had written to the defendant Francis making inquiry as to the value of any improvements that he may have made upon said lands, and was willing to pay therefor, and offered in his bill to do so; that complainant had had no opportunity to treat with defendant Francis as to such improvements except by correspondence, and that defendant Francis had failed to answer complainant's letters; that complainant had been unable to make a tender to said Francis of the amount paid by him for said lands at said exe-

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cution sale, and ten per cent. per annum thereon since said sale, together with all lawful charges, for the reason that the said Francis had been absent from the State for a number of months after said purchase, and, before going, had stated his intention of remaining away until after a certain designated time, which was after the expiration of the time allowed the complainant to redeem said property from under the execution sale; that the complainant has written to the defendant Francis repeatedly since his departure relative to his purpose to redeem said lands, and has addressed his letters, postage prepaid, to said Francis to the post office address where he had gone, but has received no reply.

The bill then contains the following averment :

"The complainant hereby offers, tenders, and pays into court for the defendant, Francis, the sum of Two Hundred and Eighty-Three and 35-100 Dollars, the amount of defendant Francis' purchase at said execution sale, and the further sum of Fifty-six and 67-100 Dollars, being ten per cent interest on the amount paid by the defendant for said lands for two years, as well as the sum of One Hundred and Twenty-Five and 25-100 Dollars, taxes paid, as far as complainant can ascertain, by defendant, on said lands since his purchase thereof, also Thirteen and 20-100 Dollars interest on same.

"Complainant has by diligent inquiry ascertained that said defendant, Francis, has paid to the City of Decatur, Alabama, on the *pro rata* of part of said property, of the special assessment levied by the city authorities on the property of said town, the sum of Three Hundred and Ten and 43-100 Dollars, which is herewith tendered and offered to said defendant, as well as the further sum of Forty-One and 76-100 Dollars, legal interest on the amount of said assessment."

The bill, then continuing, avers that the complainant has diligently inquired and searched for information respecting the amount of lawful charges against said property held by the defendant, Francis, but has been unable to ascertain them; that he is ready, able and willing to pay all lawful charges which the defendant has or holds against said lands, and submits himself to the jurisdiction of the Court; and further avers that he has been un-

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able to ascertain the correct amount of lawful charges claimed by said defendant upon said lands, otherwise than has been above stated; and he tenders said amounts, and avers his willingness and readiness to abide the decree of said Court.

It is then averred in the bill, that, subsequent to the purchase of said lands by the said Francis, he sold and conveyed to the defendant, Nelson Campbell, a certain designated portion of said lands, which is specifically described; and that subsequent to said purchase, he sold and conveyed to the defendant, Foster H. Pointer, a certain portion of said lands, which is specifically described that "the sales to said Campbell and Pointer so complicated the apportionment and redemption money as to render necessary a judicial investigation of the relative values of the parcels so conveyed, as compared with the whole; and to adjudicate the part, if any, of the purchase money tendered and paid into Court by the complainant, to be awarded to the said Pointer and the said Campbell on redemption."

It was then averred in the bill that the complainant had ascertained that the defendant, Francis, had paid a designated amount as municipal taxes, which said mount the complainant tendered and paid into Court for the said Francis, as well as the interest thereon.

It was further averred in the bill, that, prior to the filing of the bill, the complainant went to the said Foster H. Pointer and Nelson Campbell, respectively, and offered to pay to each of them, respectively, all lawful charges, the value of all permanent improvements placed by each of them on the property purchased by them of Francis, and inquired and sought to ascertain from each of them the value of the improvements, if any, which either of them had placed upon the respective parcels or portions of the property that he had purchased from the said Francis; and also offered to pay a just and proper proportion of the purchase money bid by said Francis; but that said Pointer and Campbell each peremptorily refused to accept said proposition, and refused to discuss the value of the permanent improvements placed by either of them upon said property, and refused to receive any compensation therefor, and refused to name or claim

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any sum for the lawful charges; that, therefore, the complainant offers to pay the value of all permanent improvements, the value of the lawful charges, and a proper proportion of the purchase money paid by said Francis.

The prayer of the bill was that the complainant be decreed to be entitled to redeem said lands; that the amount necessary to be paid to the defendants, and each of them, be ascertained; and that the defendants be required to accept said sums; and that upon the payment thereof, they be required to execute proper conveyances of their right, title, claim and interest, in and to said lands, to the complainant.

The defendants demurred to the bill, and assigned many grounds of demurrer, which, for convenience of reference in connection with the opinion, are set forth as follows: The 4th, 6th, 7th, 8th, 15th, 16th and 32d, grounds of demurrer, the over-ruling of which constitutes the 4th, 6th, 7th, 8th, 15th, 16th and 27th assignments of error, were as follows: (4.) The complainant does not offer in his bill to pay all lawful charges upon said lands other than those for which tender is made into Court. (6.) The complainant does not tender and bring into Court the money for all lawful charges necessary to be paid before redemption. (7.) The bill does not deny that there were lawful charges other than those described in the bill. (8.) It appears from the bill that the complainant had not tendered into Court the money for all lawful charges held by defendant Francis against said land. (15.) Ignorance upon the part of complainant respecting the amount of lawful charges against said property held by the defendant does not excuse the complainant from tendering into Court, in money, the amount of lawful charges against said property. (16.) The failure or refusal of defendants to inform complainant of the lawful charges on said lands, and the value thereof, is no excuse for the failure of complainant to tender into Court, in money, the value and amount of all of said charges. (32.) The averments of the bill show that there are other lawful charges, known to complainant, against the property sought to be redeemed, for which complainant has not made tender by paying the money into Court.

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The 1st, 2d, 28th and 29th grounds of demurrer, the over-ruling of which constitutes the 1st, 2d, 26th and 31st assignments of error, were as follows: (1.) It does not appear from said bill that C. C. Sheats, complainant's intestate, owned any right, title or interest in the lands sought to be redeemed. 2.) The bill does not show what interest the complainant seeks to redeem in the lands described therein. (28.) The averment of the bill fails to show what right, title or interest C. C. Sheats had in the lands sought to be redeemed at the time of the execution sale. (29.) The averment of the bill fails to show what right, title or interest C. C. Sheats had in the lands sought to be redeemed at the time of his death.

The 9th and 10th grounds of demurrer were as follows: (9.) It is not averred in the bill that complainant had no means of ascertaining the value of permanent improvements placed on part of the land, therein described, by Foster H. Pointer. (10.) It is not averred in the bill that complainant had no means of ascertaining the value of permanent improvements placed on a part of the land, therein described, by Nelson Campbell.

The 11th, 12th, 13th and 14th grounds of demurrer, the over-ruling of which constitutes the bases of the 11th, 12th, 13th and 14th assignments of error, were as follows: (11.) It is not averred in said bill that the complainant had no means of ascertaining the existence of all lawful charges against said lands. (12.) The bill fails to allege that complainant had no means of ascertaining the amount due for lawful charges on said lands. (13.) The bill does not show what diligence the complainant had exercised in ascertaining or attempting to ascertain the lawful charges. (14.) The allegation of said bill, that complainant has diligently inquired and searched for information respecting the amount of lawful charges against said property held by the defendant Francis, is a conclusion of the pleader, and no facts are stated showing diligence upon the part of complainant.

The 22d ground of demurrer, the over-ruling of which constitutes the basis of the 22d assignment of error, was as follows: (22.) The bill is not accompanied with the amount of money necessary to defray the expenses of executing titles from the defendants to complainant.

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The defendants also moved to dismiss the bill for want of equity.

Upon the submission of the cause upon the demurrers and motions to dismiss for want of equity, the chancellor over-ruled the demurrers and said motions. From this decree, the defendants appealed, and assigned the rendition thereof as error.

C. C. HARRIS and CALLAHAN & HARRIS, for appellants. "The statute requires that possession of the land must be delivered on demand, in ten days after said sale; that the party seeking to redeem must pay or tender to the purchaser, or his vendee, the purchase money, with ten per cent. per annum thereon, and *all other lawful charges*. The statutory right of redemption is lost if not exercised in the precise mode prescribed by the statute. This is strongly set forth in the following authorities:—"Bulley, Davis & Co. v. Timberlake, 74 Ala. 225; *Spooner v. Phillips*, 27 Ala. 197; *Burke v. Brewer*, 32 So. Rep., p. 602; *Beebe v. Buxton*, 99 Ala. 117; *Cramer v. Watson*, 73 Ala. 132; *Oldfield v. Eulert*, 39 Am. St. Rep., p. 765; *Waller v. Harris*, 32 Am. Dec., p. 590; *Ex Parte Bank Monroe*, 42 Am. Dec., p. 61; *Hill v. Walker*, 98 Am. Dec., p. 465; 2 Freeman on Judgments, sec. 314; et seq."

"If the bill does not show that a tender was made before it was filed, a tender made in it is not sufficient to authorize a decree for redemption, unless in connection with such offer, the bill shows a valid and sufficient excuse for the omission to make a tender *before it was filed*."—*Spoor v. Phillips*, 27 Ala. 197.

In construing the statutes of redemption, this court has repeatedly held that in a bill to redeem, it is necessary to give the court jurisdiction that the necessary amount to effect redemption must be paid into court on the filing of the bill.—*Long v. Slade*, 121 Ala. 271; *Murphree v. Summerlin*, 114 Ala. 57; *Beatty v. Brown*, 101 Ala. 697.

With a studied effort, the complainant avoids stating the interest of his intestate, C. C. Sheats, in the lands sought to be redeemed. Professedly, his right to redeem is the right which was vested in Sheats at the time of his death, and no other. And this bill must affirmatively

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show that the complainant has an interest in the subject matter of the suit, and a proper title to institute the particular suit concerning it.—*Goldsby v. Goldsby*, 67 Ala. 562; *Rapier v. Gulf City Paper Co.*, 64 Ala. 340.

It has been said that the purchaser at execution sale may transfer by deed his title, as he may the title to other land; and that after such conveyance, an application to redeem must be made to his vendee, and that the redemption statute contemplates a payment or tender to such vendee.—*Camp v. Simon*, 34 Ala. 126; *Lehman, Durr & Co. v. Collins*, 69 Ala. 131.

The statute has made no provision for the redemption of a part of the property. It has only granted a privilege, and this privilege cannot be enlarged or extended by judicial construction. If the courts can extend one provision, or supply one omission, they can extend or supply any number.—*Powers v. Andrews*, 84 Ala. 293.

E. W. GODBEY, *contra*.—Non-payment into court affects only part of the property, while the demurrer goes to the entire bill.—*Beall v. Lehman*, 110 Ala. 446; *George v. Cen. R. R. & Banking Co.*, 101 Ala. 607; *Richardson v. Dunn*, 79 Ala. 170.

Payment into court is unnecessary when the true amount is unknown.—*Freeman v. Jordan*, 17 Ala. 502; *Aycock v. Adler*, 87 Ala. 192.

In *Pritchard v. Sweeney*, 109 Ala. 651, it was held that the purchaser must disclose to the would-be redemptioner the value of his permanent improvements placed upon the land; and in *Posey v. Pressley*, 60 Ala. 251, it was said that a redemptioner's "duty is performed when his offer clearly indicates his willingness and readiness to pay for such improvements, and if there is a general offer to redeem, and the right of redemption is denied," the party offering to redeem will be excused from any particular inquiry as to a claim for improvements.

SIMPSON, J.—This is a bill filed by appellee, as administrator of the estate of C. C. Sheats for the purpose of redeeming certain real estate, which was sold under executions, against said Sheats, in his lifetime, the appellant, Francis, being the purchaser, and appellants,

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Pointer and Campbell being purchasers, severally, of portions of said real estate.

The appeal is from the decree of the chancery court overruling the demurrer to the bill, and the motion to dismiss the same for want of equity.

Appellant's brief discusses together assignments of error No. 4, 6, 7, 8, 15, 16 and 27, and is correct in the contention that the complainant's rights depend upon a compliance with statutory requirements in regard to the redemption of real estate. The right of redemption is a personal privilege, and, in order to avail himself of the right, the complainant must show "that he has not failed to do what the law requires, in order to invest him with the right he seeks to enforce," or must show some valid reason for his failure in any particular.—*Bank v. Brewer*, 32 So. Rep. 602; *Henderson v. Hamrick*, 29 So. Rep. 924.

When the purchaser is absent from the State, a tender, to be sufficient, must be made by a deposit of the money in court, on the filing of the bill, and the absence of the purchaser or his vendee from the State excuses the tender in person and authorizes the filing of the bill. *Beebe v. Barton*, 99 Ala. 117; *Lehman, Durr & Co. v. Collins*, 127, 132.

The bill alleges that "none of it was in the actual possession of said C. C. Sheats, but such of it as was not bare and vacant and as was susceptible of actual possession, was in the possession of tenants. If complainant is mistaken in this averment, he avers that no demand has ever been made for possession by the defendant Francis of the said C. C. Sheats, and that, if said C. C. Sheats remained or continued in the possession, he did so, by and with the consent of the defendant Francis."

Where the purchaser made no demand for possession, the failure to demand is a valid reason for failing to deliver possession.—*Baker v. Burdeshaw*, 132 Ala. 166; *Hardin v. Collins*, 35 So. Rep. 357; 138 Ala. 399.

The statute provides the course to pursue if the land is in possession of tenants.—Code, § 3506.

We hold that the averments of the bill were sufficient to dispense with the averment of delivery of possession on demand.

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It is insisted that it is the duty of the party, seeking to redeem, to ascertain at his peril what the lawful charges are, and to tender them, and that ignorance of improvements or their value, or of the lawful charges will not excuse him, and in fact nothing will excuse him except the "conduct or agreement of the purchaser," and that these words (used in the case of *Spoor v. Phillips*, 27 Ala. 197) mean that the purchaser must have been guilty of some positively wrongful conduct, or act, such as misinforming the proposed redemptioner, and that the effect of the purchaser leaving the state relieves only from the necessity of making the tender in person, and not from the duty of ascertaining, at his peril, what the lawful charges are. The law does not require impossible things of any one.

The averments of the bill show that Francis has absented himself from the State; that complainant has made diligent inquiry to ascertain his post office address, has written to him repeatedly asking for an account of the lawful charges claimed by him to have been paid, has also requested both of his vendees to inform him what lawful charges are claimed by them and they have refused to give any information. Complainant has also made diligent inquiry as to lawful charges, has tendered into court the amount of all that he has been able to ascertain, and offers to pay all lawful charges which may be ascertained under the orders of the court.

This court, speaking through Chief Justice Brickell has said: "Upon the purchaser, or party in possession, claiming compensation for permanent improvements, rests the duty of informing the party coming to redeem of the character and extent of the claim."—*Cramer v. Watson*, 73 Ala. 133; *Prichard v. Sweeney*, 109 Ala. 655.

The averments of the bill in this case show a sufficient tender of the lawful charges.—*Hardin v. Collins*, 138 Ala. 399; *Baker v. Burdeshaw*, *supra*.

In the case of *Long v. Slade*, 121 Ala. 267, referred to by appellant, there was no tender made in court at all; while in the case at bar, the bill shows that the purchase money and 10 per cent, and the amount of all the charges which complainant has been able to ascertain, with one omission hereinafter noted, have been deposited

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in court, and the bill offers to pay all charges which may be ascertained. The only things which prevent a full tender are the absence of Francis from the State (alleged in the bill to be for the very purpose of preventing a tender) and the refusal of the other defendants to give information.

Section 3517 of the Code refers only to the case where the "parties cannot agree upon the *value* of improvements," which presupposes that they are informed as to what the improvements are, and are willing to treat with each other as to their value, but when one party remains outside of the State and will not even communicate with the party proposing to redeem, and the others "refuse to entertain any proposition whatever for compensation," and refuse "to accept any payment" for "lawful" charges there is nothing to appoint a referee for.

It is a general principle of law that "the law does not compel one to do vain or useless things. * * * An actual tender of performance may be excused when there is a willingness and an ability to perform and actual performance has been prevented, or expressly waived by the parties to whom performance is due."—28 Am. & Eng. Ency. Law, (2d ed.), p. 5.

With regard to the \$310.43 which the bill shows complainant has ascertained was paid for sewer tax on the property by said Francis, the averment, in the bill, of tender is not sufficient, in as much as it fails to aver that the amount is paid into court.—21 Ency. Pl. & Pr. 565; *Christian v. N. F. I. Co.*, 101 Ala. 642; *Caldwell v. Smith*, 77 Ala. 164; *Booth v. Comegys*, Minor, 201.

Referring to the 26th, 31st, 2nd and 1st assignments of error, which refer to the ownership of complainant's intestate in the lands: "The levy of the execution on land as the property of the debtor, and its sale and purchase as such, are conclusive on the purchaser." The allegations of the bill make out a *prima facie* case in favor of the complainant, on that point, and if there be any facts to the contrary it is matter of defense.

It is next insisted by appellant that, as a prerequisite to the filing of the bill, in this case, the complainant must show that he has made a tender, in accordance with the statute, and that, as the vendee is the party entitled to

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the redemption money, where property has been sold, the tender must have been made to both Campbell and Pointer (the purchasers of portions of the land) as well as to the original purchaser, Francis, and that, as the statute has made no provision for *pro rata* payment, nor for redeeming any portion of the land less than the whole, therefore, the tender should be of the entire amount, necessary to redeem the whole, to each of the parties in interest, thus making it necessary, in this case, for the party proposing to redeem to tender three times the amount necessary to redeem the land. Then, if he tenders in this manner, each person can receive the amount tendered, and if they should prove to be insolvent, the debtor might lose two-thirds of his money, and by the operation of this kind of process, it would always be in the power of the purchaser at execution sale to absolutely deprive the debtor of the right of redemption which the statute gives him. Yet, the point is not without difficulty, owing to the fact that the law-makers do not seem to have anticipated just such a state of affairs as here exists, and we have not been able to find any case exactly in point.

Let us see then how the matter stands, according to our statutes: Sections 3505 and 3507 of our Code, certainly give to the judgment debtor the *right* to redeem the entire tract of land by paying "the purchase money with ten per cent per annum thereon, and all lawful charges," and it is not in the power of the purchaser or any one else to deprive him of that right, and, according to well recognized principles of equity, if, by the act of the purchaser himself, matters have been so adjusted that the debtor cannot comply with the statute by tendering the required money, in accordance with the statute, then said purchaser is estopped from complaining that such tender has not been made.

We have then here an absolute *right* without any remedy provided by law: The complainant has the *right*, under the statute to redeem all of the land by paying once, what the statute requires, and yet he cannot make the payment, because the purchaser has absented himself from the State, and has conveyed parcels of the land to Campbell and Pointer. He has no right to pay to either

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of them, that part of the redemption money which belongs to the other, and yet he has no authority to apportion it and redeem the parcels separately. Is not this then, according to the first principles of equity jurisprudence, a case which suggests the resort to a court of equity?

Upon these very grounds he comes into a court of equity, pays the money, which the law requires, into court, and asks the court to distribute it to the parties according to their interests and rights, and further offers to do and pay whatever, in addition thereto may be just and equitable, in the estimation of the court.

It certainly then cannot be urged against his right to invoke the aid of a court of equity, that he did not previously do the thing which he could not do, and his inability to do which formed the ground of his right to come into equity.

In the *Baker v. Burdenshaw* case, *supra*, this court held that if "a proper tender is rendered impracticable, by the act of the person to whom it is due, that fact will, on proper averments, be sufficient to excuse a failure to tender."—p. 168. There was no error in overruling causes of demurrer numbered 9 and 10.

Complainant went to Campbell and Pointer, and offered to pay them not only their proportion of the purchase money with 10 per cent, but also for all permanent improvements and lawful charges, and they refused to give him any information and refused to receive compensation. This absolved him from any further duty in regard to those matters.—*Cramer v. Watson* and *Prichard v. Sweeney*, *supra*.

What has been said disposes also of assignments 11, 12, 13 and 14, which are not sustained.

The 22nd assignment of error raises the point that the cost of executing the deed should have been included in the tender and should have been paid into court.

When the complainant offered to pay all lawful charges and asked for information as to their amount, this item should have been included with others, but one defendant refused to communicate with him and the others refused absolutely to treat with him or receive any thing, and when he files his bill in court it is not

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necessary to make a deposit of this small amount, as the conveyance will be made under the orders of the court and the amount will become a part of the court costs.

There was no error in the court's overruling the motion to dismiss the bill for want of equity, as the law presumes all amendable defects to be amended, on this motion, and the matter which has been pointed out, in which the demurrer was well taken would not justify the court in dismissing the bill for want of equity.

The matter of the payment of costs rests within the discretion of the courts.—*Falkner v. Campbell Printing etc. Co.*, 74 Ala. 360, 364; *Allen v. Lewis*, 74 Ala. 379; *Gray v. Gray*, 15 Ala. 779.

The decree of the court, in so far as it overruled the motion to dismiss the bill for want of equity, is affirmed, but, for the error in failing to sustain the cause of demurrer stated, the case is reversed, and a decree will be here entered sustaining the demurrer, and the cause is remanded.

Affirmed in part and, in part, reversed, rendered and remanded.

MCCLELLAN, C. J. TYSON and ANDERSON, J. J., concurring.

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Bill in Equity for Discovery of Assets.

1. *Bill for discovery; sufficiency of averment.*—A bill filed by simple contract creditors against their debtors for discovery of assets under the statute (Code, § 819), which avers that the defendants are indebted to the complainants in certain various amounts, that the defendants have no visible means subject to legal process of value sufficient to pay the claims of complainants; that the defendants have no property standing in their own name or in the name of the partnership of which they are members, which can be reached or subjected to legal process for the satisfaction of the claims of complainants, but that defendants have property, real or personal, or money

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or effects or choses in action, or have an interest in real or personal property, money, effects or choses in action, which are, and should be subject to the payment of complainants' claim, but the kind and description of the property and how the same is held are kept concealed and hidden by defendants, and are unknown to complainants, and that a discovery is necessary to enable complainants to reach and subject the property to their respective claims, is sufficient in its averments to authorize the maintenance of such bill; and is not subject to demurrer upon the ground that it is not shown by such averments that the property sought to be discovered would not be exempt from the payment of complainants' claims.

2. *Bill for discovery; sufficiency of affidavit.*—Where a bill is filed by creditors against a common debtor seeking a discovery of assets of the defendant, and it is averred in the bill that each of the complainants is a non-resident of the State, the verification of such bill by the affidavit of one of the complainants' counsel in which the affiant states that the complainants were absent from the State, shows a sufficient reason why the verification was made by one of the counsel for the complainants, (Rule 15 of Chancery Practice, Code, p. 1205.)
3. *Same; same.*—Where the averments of the bill for discovery are positive and are not made upon information and belief, the verification of such bill by an affidavit made by one of complainants' counsel, which states that the complainants are absent from the State, and that the statements contained in the bill of complaint are true, is sufficient.

APPEAL from the Chancery Court of Cullman.

Tried before the Hon. WILLIAM H. SIMPSON.

The bill in this case was filed by the appellees, who constituted three separate and distinct partnerships, all of whom were non-residents of the State of Alabama, against the appellants. The purpose of the bill and the averments of facts are sufficiently set forth in the opinion. The bill was verified by the affidavit of Robert L. Hipp, who was one of the complainants' counsel, and this affidavit was as follows: "Before me, A. E. Hewlett, Register in Chancery within and for the County and State aforesaid, personally appeared Robert L. Hipp, who being by me duly sworn on oath, says that he is one of the solicitors of the complainants in the above entitled case, and, that all of the complainants are absent from

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the State of Alabama, and the statements contained in the bill of complaint as filed by the complainants in said cause are true. (Signed) Robt. L. Hipp."

The defendants demurred to the bill upon the following grounds: "First. Because it is not alleged therein that the said defendants conceal or withhold any assets or property liable to the satisfaction of said alleged debts, and which can be legally subjected thereto. Second. Because from all the allegations in said bill said discovery would be useless and unavailing to the complainants, in this that the property or assets, if any, discovered, would be exempt from said debts. Third. Because said bill is not verified as required by law in this, that it is verified by attorney, and no sufficient excuse is shown therefor, the facts that complainants are absent from the State, not being sufficient. Fourth. Because said bill is not properly verified in this, it is verified by attorney alone and it is not shown therein that he had any knowledge of any facts to which he was verifying."

On the submission of the cause upon this demurrer, the chancellor rendered a decree overruling said demurrer. From this decree the defendants appeal and assign the rendition thereof as error.

GEORGE H. PARKER, for appellants.—The bill must show that the defendants have "means, assets, not accessible under legal process *liable to the satisfaction of the debt*, for the discovery of which the bill is presented."—*Lawson v. Warren*, 89 Ala. 587; *Gyvice v. Parker*, 46 Ala. 616; *Sweeter v. Buchman*, 94 Ala. 574.

The affidavit by whomsoever made, must be made by some one acquainted with the facts.—*Youngblood v. Schamp*, 15 N. J. Eq. 42. Here are some Alabama cases which require the party making affidavit to show that he had some knowledge of that which he was swearing to, and could not make a wholesale affidavit, whether he know the facts or not.—*Pick's Admr. v. Ezzell*, 27 Ala. 623; *Glore Iron Co. v. Thacher*, 89 Ala. 465; *Burgess v. Martin*, 111 Ala. 656.

BROWN & HIPPI, *contra*—The averments of the bill in this case are sufficient as a bill for discovery.—*Drennen v. Alabama National Bank*, 117 Ala. 320; *Moore v. Ala-*

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bama National Bank, 120 Ala. 89; *Freeman v. Rullen*, 119 Ala. 235, and authorities there cited; *Pollak v. Billing*, 131 Ala. 519.

The affidavit shows that the complainants are non-residents which is a sufficient reason for the bill being verified by an attorney.—Ch. R. P. 15p. 1305 of Code; *Guyton v. Terrell*, 132 Ala. 66. Since the affiant made affidavit that the statements in the bill “are true,” and did not say “by information, etc.” when it is not necessary or expected that he sets out any facts showing why or how he knows them to be true.—*Burgess v. Martin*, 111 Ala. 656; *Guyton v. Terrell*, 132 Ala. 66.

DENSON, J.—The bill was filed by simple contract creditors for discovery of assets under section 819 of the Code, and to subject them to the payment of complainants’ debts due them by the respondents.

After averring that the respondents P. H. Kinney and F. H. Kinney were engaged in a general merchandise business at Nauvoo, Alabama, under the firm name and style of P. H. Kinney & Company, and that they became indebted to complainants in the various amounts set forth in the bill, which amounts are averred to be past due and unpaid, the bill avers that the said P. H. Kinney and F. H. Kinney and said P. H. Kinney & Company have no visible means subject to legal process of value sufficient to pay the claims of complainants; that the said P. H. Kinney and F. H. Kinney have no property standing in their own name, or held by them in their names, or in the name of the said partnership of which they are members, which can be reached or subjected to legal process for the satisfaction of the claims of the complainants but that said P. H. Kinney and F. H. Kinney and P. H. Kinney & Company have property, real or personal, or money, or effects, or choses in action, or they have an interest in real or personal property, or money, or effects, or choses in action which are and should be subjected to the payment of complainants’ claims, but the kind and description of the property and how the same is held, it is averred, is kept concealed and hidden out and is unknown to complainants. It is then averred that a discovery is necessary to enable com-

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plainants to reach and subject the property to complainants' claims.

Tested by the rules of pleading laid down in the cases of *Succeter, Pembroke & Co. v. Buchanan*, 94 Ala. 574 and *Pollak v. Billing*, 131 Ala. 519, applicable to bills of discovery, the averments of the bill are sufficient against the first and second grounds of the demurrer. Furthermore, as to the second ground of the demurrer, the averments of the bill do not show that the property sought to be discovered would be exempt from being applied to the satisfaction of complainant's debts, and this ground of demurrer seeks to introduce by demurrer matter which is foreign to the allegations of the bill, and, therefore, it falls under the head of what is commonly characterized as a "speaking demurrer."—*Bromberg Bros. v. Heye Bros.*, 69 Ala. 22; *Ramage v. Towles*, 85 Ala. 588.

Rule 15 of chancery practice, Code, p. 1205, provides that a bill may be sworn to by an agent or attorney, but the affidavit must set forth a sufficient reason why it is not verified by the complainant himself. We think the fact the complainants were absent from the State, as shown in the affidavit, a sufficient reason why the verification was not made by one of them.—*Guyton v. Terrell*, 132 Ala. 67.

The averments of the bill are positive and are not made upon information and belief. The affidavit positively affirms that the statements contained in the bill are true.

The point made against this affidavit by the 4th ground of the demurrer is, that the affidavit is made by an attorney and it is not shown in the affidavit that the affiant had any knowledge of the facts which he was verifying. We must in the absence of any thing to the contrary presume the existence of such knowledge, when the averments of the bill are direct and positive and the affiant swears positively, and not upon information and belief. In the cases cited by appellant, namely, *Pick's Admr. v. Ezzell*, 27 Ala. 623; *Globe Iron Co. v. Thacher*, 87 Ala. 465; *Burgess v. Martin*, 111 Ala. 656, the affidavits appear to have been made upon information and belief.

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There is no error in the record and the decree of the chancery court is affirmed. The defendants will be allowed thirty days in which to answer the bill.

Affirmed.

MCCLELLAN, C. J., HARALSON and DOWDELL, J. J., concurring.

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Action for Unlawful Detainer.

1. *Unlawful detainer; possession by tenant.*—Where a tenant, who is in possession, attorns to one who claims the ownership of the property, the person to whom he has so attorned, can maintain an action of unlawful detainer against such tenant for his holding over after the termination of the term of his lease.
2. *Same; tenant at will; necessity for terminating tenancy.*—Where one is in possession of land as a tenant at will of the owner, before the owner can maintain an action for unlawful detainer, he must give notice to the tenant of his desire and intention to terminate the tenancy, and then must make, after such notice, a written demand for the delivery of the possession of the land; and in such an action where there is no proof showing a termination of the defendant's possessory interest, he is entitled to the general affirmative charge.
3. *Unlawful detainer; sufficiency of written demand for possession by attorney of landlord.*—While the statute gives the agent or attorney of a landlord, the authority to make a written demand upon the tenant for delivery of possession, before such a landlord can maintain an action for unlawful detainer, it must be shown by the evidence that the attorney who makes the demand was in fact at the time it was made, the attorney of the landlord; and the subsequent bringing of the suit by an attorney does not create the presumption that he was the landlord's attorney at the time the written demand was made.
4. *Evidence; when motion to exclude all the evidence properly overruled.*—A motion to exclude the whole of a witnesses' testimony, is properly overruled, if any part of such testimony is relevant and admissible.

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- 5 *Unlawful detainer; admissibility in evidence of deed.*—In an action of unlawful detainer, a deed to the plaintiff is admissible to show the extent of his possession to the premises in controversy, and the fact that such deed does not convey all of the land claimed in the complaint, is no ground for its exclusion.
6. *Evidence; motives or wishes of witness inadmissible.*—The testimony of a witness as to his uncommunicated motives, wishes or mental interests, is inadmissible.
- 7 *Unlawful detainer; statute of limitation.*—In an action of unlawful detainer, where it is shown that the defendants attorned to the plaintiffs within three years prior to the bringing of the suit, the statute of limitation of three years is not available to the defendant.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WILLIAM S. ANDERSON.

This suit was brought by the appellee, George H. Stephens, against the appellant, Louisa Barnewell, Susie Johnson, George Barnewell and Ella Barnewell. The complaint as originally filed contained two counts. The first count was for unlawful detainer, and the second for forcible entry and unlawful detainer. The defendant pleaded the general issue and by special plea set up the statute of limitation for three years. Upon issue joined by these pleas the cause was tried.

The tendencies of the evidence are sufficiently set forth in the opinion. During the examination of the witness Austill, he testified that during the year 1901, he had been on the land involved in the suit with one George C. Boltz. He was then asked to tell what took place at the time he went there with Boltz. Upon the witness answering that "he made statements to me that made me wish to visit the family down there," the defendant objected to the answer and moved to exclude it, and upon the court's overruling his objection and motion, the defendant duly excepted. The written demand that was shown by the testimony and admitted by the defendants to have been served upon them, was in words and figures as follows: "Mobile, Ala., December 2, 1902. To Louisa Barnewell, Susie Johnson, George Barnewell and Ella Barnewell: This is to demand that you immediately vacate and surrender to the under-

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signed who is the owner of the same, the following described land, to-wit, (describing the land involved in suit.) (Signed) George H. Stephens, by R. T. Ervin, Shelton Sims, his attorneys." Upon the introduction of all the evidence, the defendants requested the court to give to the jury the following written charges; and separately excepted to the court's refusal to give each of them as asked: (1.) "The court charges the jury, if you believe the evidence, you must find for the defendants, Susie Johnson, Geo. Barnewell and Ella Barnewell." (2.) "The court charges the jury, if you believe the evidence, you must find for the defendants." (3.) "The court charges the jury, that if you believe from the evidence that the defendants have had three years undisputed possession of the property sued for, before the commencement of this suit, they should find for the defendant." There were verdict and judgment for the plaintiff.

The defendants appeal and assign as error the several rulings of the trial court, to which exceptions were reserved.

L. H. & E. W. FAITH for appellants.—This notice was signed, not by the plaintiff personally, but by Shelton Sims and R. T. Ervin, as his attorneys. There was no evidence as to their authority to make such demand, and the subsequent bringing of the suit is no ratification. The following cases are directly in point, and we think require a reversal, because of the refusal to give general charge for defendant.—*Brahn v. Jersey City Forge Co.*, 38 N. J. L. 76-78; *Mechem on Agency*, § 179, p. 116; *Story on Agency*, § 246.

Where the tenancy is a tenancy at will or by sufferance two notices are necessary to be given to the defendants before they can be evicted under an action of unlawful detainer. The one notice has for its object the termination of an existing lease or tenancy, which in the absence of said notice will sanction and justify the tenant's continued possession.—*McDevitt v. Lambert*, 80 Ala. 540.

The contract of tenancy was not proved as alleged, the variance was material, and the general affirmative

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charge should have been given for appellants.—*Moses v. Beverly*, 34 So. Rep. 825; *S. & N. Ala. R. R. v. Wilson*, 78 Ala. 588, 589. There was no evidence as to any forcible entry.

ERVIN & MCALEER, *contra*.—The plea of adverse possession of three years would not be proven if the jury found the defendants held as tenants, for then their possession was that of the landlord.—*Nicrosi v. Philippi*, 91 Ala. 304; *Barefoot v. Wall*, 108 Ala. 329.

The deed to the plaintiff from Mrs. Cleveland was admissible in evidence. All the authorities recognize that a deed is admissible to show the description of the land.—*Turnley v. Hannah*, 82 Ala. 143.

ANDERSON, J.—The complaint in this case contains two counts, one for unlawful detainer and the other for forcible entry. There was judgment for the plaintiff in the court below and the defendant appeals.

In order for the plaintiff to recover under either count, he must have had a previous possession of the premises. There was no evidence to support the count for forcible entry as the defendants were in possession, at the time the plaintiff's pretended possession began, and if they were guilty of anything, it was for holding over after the termination of the possessory interest, as tenants of the plaintiff.

The undisputed evidence was, that the defendants had been in possession of the land for years. But plaintiff claims that they *attorned* to him, and became his tenants at will, and bases his possession upon said *attornment* made to his agent Austill, and which if true, will give the plaintiff a right of action for an unlawful withholding.—*Barefoot v. Wall*, 108 Ala. 327; *Anderson v. Anderson*, 104 Ala. 428; *Nicrosi v. Philippi*, 91 Ala. 299.

It appears from the evidence of Judge Austill, that Louisa and Henry Barnewell agreed to become the tenants of the plaintiff, and that they did so in the presence and hearing of all of the members of the family, some of whom are made parties defendant with their mother, Louisa Barnewell.

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"An unlawful detainer is, where one has lawfully entered into possession of lands or tenements, and after the termination of his possessory interest, refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent or attorney." Code, 1896, § 2127. In other words, before the suit can be maintained, there must have been a termination of the tenants possessory interest. If the defendants became the tenants at will of the plaintiff, he had a right to terminate the relationship, but he must have given some notice to them of his desire or intention to terminate, before he had the right to make the written demand for the delivery of the possession. And in the absence of proof showing a termination of defendant's possessory interest, they were entitled to the general affirmative charge.—*McDevitt v. Lambert*, 80 Ala. 536.

The rule of law is, that by disclaiming and denying the landlord's title or asserting an adverse claim to title in himself, openly and notoriously, brought to the notice of the landlord, the tenant commits a forfeiture. Generally, attornment, or delivery of possession, to a stranger or adverse claimant, or any act disavowing the title of the landlord, and claiming a superior hostile title or ownership, amounting to a repudiation of the tenancy, will establish a ground of forfeiture.—*Dahem v. Barlow*, 93 Ala. 120.

There was no legal evidence of acts on the part of the defendants sufficient to create a ground of forfeiture and thereby terminate their possessory interest. On the other hand, the witness Judge Austill, testified that he visited them and told them, that he had heard rumors of a hostile claim, and that they then and there denied the rumor and recognized the plaintiff's title.

The plaintiff did introduce in evidence, over the objection of the defendants, a certain record setting up a claim to land by these defendants, as set out in the accompanying map made by one, Bart, and which was not competent evidence, as the map described land in an entirely different section from the land sued for in the complaint. But even with the record in, there was no evidence to show a termination of the defendant's pos-

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sessory interest to the land in controversy, by forfeiture or otherwise.

The statute requires that a written demand be made after the termination of the possessory interest by any one lawfully entitled thereto, his agent or attorney. The demand in this case was made by Ervin and Sims as attorneys for plaintiff, and there is no question but what the statute gives the agent or attorney the right to make the demand, but the evidence should show that the party who makes the demand was, in fact, the agent or attorney when the written demand was made. Nor does the subsequent bringing of the suit by them as attorneys, create the presumption that they were such when the demand was made, and dispense with the necessity on the part of the plaintiff of proving that they were his attorneys when they made the written demand.—*Jesse French Piano Co. v. Johnston*, (Ala.) 37 South, 924; *Strauss v. Schwab*, 104 Ala. 669; *Butler v. Jones*, 80 Ala. 436; 2 South, 300; *Bolling v. Kirby*, 24 St. Rep. 789 and note; *Moore v. Refrigerator Co.*, 128 Ala. 621; *Kennedy v. Hitchcock*, 4 Porter, 230; 2 Greenleaf on Evidence, 644.

It is always presumed that an attorney appearing and acting for a party to a cause, has authority to do so, and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority, to sustain his denial by a clear preponderance of the evidence.—3 Am. & Eng. Ency. Law, p. 375. The presumption of employment or authority, however, is not indulged in by the court's anterior or incidental to the accrual of the cause of action.

It was said in the case of *Brahn v. Jersey City Forge Co.*, 38 N. J. Law Rep. 76: "The demand of possession was in writing, signed 'The Jersey City Forge Company, by B. Buchanan Yale, Pres't,' and service thereof was acknowledged by Brahn in writing. The sufficiency of the demand is denied, on the ground that it does not appear affirmatively that it was a demand by the landlord or his lawfully authorized agent. The act authorizing this summary proceeding preserves the rule of the common law that the notice to quit must be given by the

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landlord personally, or by his duly appointed agent. If by the agent, it must appear that he is clothed with power to give the notice at the time it was given. Ordinarily, a subsequent ratification of an agent's act by the principal will be sufficient, but between landlord and tenant the rule with regard to the notice differs from that which governs between principal and agent as to other transactions. A subsequent assent on the part of the landlord will not establish by relation a notice given in the first instance without his authority. The reason is that the tenant must act upon the notice at the time it is given; and it must, therefore, at that time, be such a notice as he can act upon with security, and if authority by relation were sufficient, the tenant would be subject to the injustice of being left in doubt as to his action until the ratification or disavowal of the principal. * * * * * The mere fact, therefore, that the company adopted the act of its agent by instituting these proceedings, based upon the legality of the demand for possession, is not, of itself, sufficient to justify the implication that the agent had the requisite authority at the time he served the notice."

Judge Story, in his work on Agency, § 246, says that if the act done by the agent would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses, for the non-performance of that act or duty, or would defeat a right or estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal, will not give validity to it, so as to bind such third person to its consequences; and within this rule he instances the case of a notice to quit given by an unauthorized person for the landlord, subsequently ratified by the latter.

"A well recognized illustration of this rule exists, also, in the case of landlord and tenant. Thus a subsequent assent on the part of the landlord will not establish by relation an unauthorized notice to quit given by his agent. The tenant must act upon the notice at the time it is given, and the notice must, therefore, at the time, be such as he can act upon with security; otherwise the tenant would be subjected to the injustice of being left

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in doubt as to his action until the ratification or disavowal of the principal.”—Mechem on Agency, § 179.

The refusal of the trial court to exclude the evidence of Mrs. Thompson in its entirety was free from error. Upon the cross examination she admitted that all that she knew about her mother renting the place to Barnewell was hearsay. But she did testify that her mother put Barnewell in possession of the land, as an independent fact and which was relevant evidence. The trial court cannot be put in error for refusing to exclude the whole of a witness' testimony, if any part of it was relevant.

The deed from Mrs. Cleveland to the plaintiff was admissible to show the extent of his possession to the premises in controversy.—*Turnley v. Hanna*, 82 Ala. 143; *Bohannon v. State*, 73 Ala. 47; *Brady v. Huff*, 75 Ala. 80. There is nothing in the point made in brief of defendant's counsel, that the deed was not admissible because it did not contain all the land claimed in the complaint. It was good to show that the possession extended to so much of the land as it purports to convey.

The motion to exclude the statement of the witness, Judge Austill, “that Boltz made statements to witness, that made him wish to visit the family down there,” should have been granted. It is a well established rule, that witnesses are not permitted to testify to their motives, wishes, or mental status.—*McRae v. State*, (Ala.) 38 South, —; *McCormick v. Joseph*, 77 Ala. 236.

If it was true that the defendants attorned to the plaintiff within three years previous to the bringing of the suit, the statute of limitation was not available to them.—*Barefoot v. Wall*, 108 Ala. 327; *Nicrosi v. Philippi*, 91 Ala. 299.

For the errors heretofore pointed out the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J. J., concurring.

[Edins v. Murphree.]

Edins v. Murphree.

Bill in Equity Seeking Construction of Deed.

1. *Significance of term "bodily heirs," when used in conveyance.*
Where a conveyance is made to a person and her "bodily heirs," such instrument conveys to such person a fee simple in the lands conveyed, unless a contrary intention on the part of the grantor appear on the face of the instrument.
2. *Same.*—The words "bodily heirs," in their ordinary legal significance, are taken to mean the issue of the body of a person in all generations to the end of time, rather than as meaning "children," as the first generation of issue of such person's body.
3. *Dismissal of bill for want of equity; possibility of amendment no ground for retention against.*—The possibility that a bill in equity which shows a want of equity, could be amended so as to give it equity, affords no ground for its retention against a motion to dismiss.

APPEAL from Chancery Court of Coffee County.

Heard before the Hon. W. L. PARKS.

This is a bill in equity filed by appellants, Richard Edins, Will Edins, Henry Edins and Lee Edins, a minor by his next friend, Richard Edins, against Joel D. Murphree, for the division of a certain piece of land in Coffee County. The bill alleged that complainants are the children of one Nancy Edins, grantee in a certain deed by which the said parcel of land sought to be divided was conveyed to her by G. B. Flowers, grand-parent of complainants, the provisions of which said deed are set out in the opinion of the court. And it is further alleged in said bill that it was the intention of the said Flowers to convey by said conveyance a joint ownership in said parcel of land to each of the complainants and Nancy Edins, the complainants, being at that time the bodily heirs of Nancy Edins; and that the said Nancy Edins and her husband afterwards being indebted to respondent attempted by a deed in proper form to convey the whole of said parcel of land to respondent, and that, as

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a matter of fact, said Nancy Edins only owned one-fifth interest in said land.

The respondent demurred to said bill on the ground that it showed on its face that the complainants had no interest in said land, and that the deed set out in the bill governed in arriving at the grantor's intentions and not the allegation of intention (without more) in the bill. Respondent also moved to dismiss said bill for want of equity. The chancellor rendered a decree dismissing the bill for want of equity. From this decree complainants appeal, and assign the rendition thereof, and the failure of the court to allow complainants to amend, as error.

J. F. SANDERS and SOLLIE & KIRKLAND, for appellants. Cited *Sullivan v. McLaughlin*, 99 Ala. 64; *Felious v. Tann*, 9 Ala. 999; *Powell v. Glenn*, 21 Ala. 459; *Williams v. McKenzie*, 36 Ala. 22; *Robertson v. Johnson*, *Ib.* 197; *May v. Ritchie*, 65 Ala. 622; *Slayton v. Blount*, 93 Ala. 577; *Lee v. Moore*, 105 Ala. 435; *Campbell v. Noble*, 110 Ala. 382.

The court should not have dismissed the bill without giving the right to amend. It cannot be asserted by a mere reading of the bill and the deed in question, that no facts existed which could have given the bill equity. *Kyle v. McKenzie*, 94 Ala. 239; 3 Brickell's Dig., 379, § 197.

FOSTER, SAMFORD & CARROLL, *contra*.—The words "bodily heirs" are uniformly construed as words of inheritance and not of purchase.—*Vanner v. Young*, 56 Ala. 260; *Smith v. Greer*, 88 Ala. 414; *Slayton v. Blount*, 93 Ala. 575; *Wilson v. Alston*, 122 Ala. 630.

It is only where there is some other expression in the conveyance taken with the attendant facts and circumstances, all of which show that it was intended to be used as a word of purchase or grant and not of inheritance that it will have that meaning.—*Slayton v. Blount supra*; *May v. Ritchie*, 65 Ala. 602; *Sullivan v. McLaughlin*, 99 Ala. 60.

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MCCLELLAN, C. J.—The question in this case is whether the *children* of Nancy Edins living at its date, took as tenants in common with her under the following deed: “Know all men by these presents that we, G. B. Flowers and wife Elizer Flowers, for the love and affection that we have for our daughter Nancy Edins and her bodily heirs, do grant and convey unto the said Nancy Edins, and her bodily heirs the following described lands, to-wit: (description) to have and to hold to her own use and bodily heirs, and we, G. B. Flowers and wife Elizer Flowers, for ourselves, heirs or assigns, will warrant and defend the above named lands unto said Nancy Edins, her heirs and assigns, against the lawful claims of all other persons.” If the words “bodily heirs” as employed in this conveyance are to be given their ordinary, legal significance the estate is a fee simple in Nancy Edins—that is at common law it would have been an estate tail in her which our statute converts into a fee simple. Those words are to be taken in that sense—to mean the issue of the body of Nancy Edins in all generations to the end of time, rather than as meaning her children, the first generation of issue of her body—unless it can be said to appear *upon the face of the instrument* that the grantor intended by their use to designate the *children* of the said Nancy. We are unable to find any such thing in the writing. There is nothing in the situation and relations of the parties as disclosed in the writing—and beyond the writing in a case of this character we cannot look even for the circumstances attending its execution—that is inconsistent with a purpose on the part of the grantors to convey a fee tail, or a fee simple to their daughter Nancy Edins, and the word “children” is not employed at all. In this respect the case is radically different from that of *Wilke v. McGraw*, 91 Ala. 631, relied on by appellants, and fails to measure up to any case in which this court has construed the words “bodily heirs,” or “heirs of the body” to mean children.—*May v. Ritchie*, 65 Ala. 602; *Slayton v. Blount*, 93 Ala. 575; *Wilson, et al. v. Alston*, 122 Ala. 630.

This was the view taken by the chancellor; and upon it he properly dismissed the bill for want of equity. The

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possibility that the bill could be amended so as to give it equity afforded no ground for its retention against the motion to dismiss.—*Seals v. Robinson*, 75 Ala. 363; *Gardner v. Knight*, 124 Ala. 273; *Tait v. Mortgage Co.*, 132 Ala. 193, 199, 200; *Turner, et al v. City of Mobile*, 135 Ala. 73, 130.

Affirmed.

TYSON, SIMPSON and ANDERSON, J. J., concurring.

American Ice and Industries Co. et als. v. Crane.

Bill in Equity to Enjoin a Corporation from Issuing Bonds.

1. *Corporations; when bond issue invalid.*—A corporation in this State cannot issue bonds except for money, labor done, or property actually received (Constitution, Sec. 234; Code, § 1270); and, therefore, where the officers of a corporation have authorized the issuance of bonds which are to be distributed among the stockholders, such issuance is unauthorized and may be restrained at the suit of a stockholder.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. JOHN C. CARMICHAEL.

The bill in this case was filed by the appellee, A. F. Crane, against the American Ice and Industries Company and certain named officers and agents of said Company for the purpose of enjoining said corporation and its officers from executing bonds of the corporation in excess of the sum of \$50,000. The facts averred in the bill and answer are sufficiently set forth in the opinion.

The defendants demurred to the bill on the following grounds: (1.) That so far as said bill of complaint shows, it appears that the complainant is the only stockholder who complains of said proposed action of the corporation, and that the said injury to the complainant

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will be slight and inconsiderable, and will affect all stockholders alike. (2.) That said bill of complaint fails to show any transaction on the part of the defendant that is wrongful and illegal. (3.) That so far as said bill of complaint shows, the complainant would have full right of action against any or all of said directors who might be guilty of misconduct or malfeasance in office. (4.) That if the Court should grant the permanent injunction prayed for in said bill of complaint, the said corporation would be hopelessly crippled from using at least \$50,000 of possible assets as a basis for acquiring such other amounts as will be used for perfectly legitimate purposes. (5.) That said bill of complaint fails to show that said contemplated action on the part of said directors would inflict a great and irreparable injury on the complainant's interest in said corporation. (6.) That said bill of complaint is without equity.

The defendant also moved to dismiss the bill for want of equity, and also moved to dissolve the temporary injunction, which was issued upon the filing of the bill, upon the ground that said bill was without equity.

Upon the submission of the cause upon the motions and demurrer, the chancellor rendered a decree overruling each of said motions and overruling the demurrer. From this decree, the defendants appealed, and assigned the rendition thereof as error.

DILL & ALLEN, for appellants.

LEDBETTER & JOHNSTON, *contra*.—Cited Constitution of 1901, Art. 13, Sec. 234; *Fitzpatrick v. Dispatch Publishing Co.*, 83 Ala. 604; *Parsons v. Joseph*, 92 Ala. 403; *Mabel Mining Co. v. Pearson Coal & Iron Co.*, 121 Ala. 567, and cases cited; *Niehaus & Co. v. Cooke*, 134 Ala. 223; *Memphis & Charleston R. R. Co. v. Wood*, 88 Ala. 647.

HARALSON, J.—The defendant company, as is alleged in the bill, was incorporated with a capital stock of \$100,000.00, divided into 1000 shares of \$100.00 each, of which the complainant was the owner of fifty shares.

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The bill charges in substance, that three of the directors of said corporation,—Drake, Eben and Wright,—proposed to complainant, on the 9th day of April, 1904, that he should consent to an issue of a \$100,000.00 of the bonds of said corporation,—to be secured by a mortgage on its property,—in excess of the amount of its outstanding obligations of \$50,000.00, such excess to be delivered to and used by the stockholders for their own benefit, which proposition was not accepted by complainant; that they caused notice to be given of a meeting of the stockholders to be held on the 21st day of May, 1904, for the purpose of electing a board of directors and considering the proposition to issue \$100,000.00 of six per cent 15 year gold coupon bonds, to be secured by a deed of trust on all the property of said company, which meeting complainant states, on information and belief, was not called as provided by the by-laws of said corporation.

It is further alleged, that said meeting was held, a new board of directors was elected, leaving complainant out of the board, which, it is alleged was done on account of his opposition to the issue of said bonds, and resolutions were adopted in said meeting, which complainant opposed as being illegal, reciting that the company was indebted to various persons in the sum of \$50,000.00; that it was desired to provide for this indebtedness and for further improvements of the company's property, "and for such other purposes as the board of directors may deem expedient," and resolving that the company be authorized to issue \$100,000.00 of six per cent 15 year gold bonds, interest payable semi-annually, and that it should take steps to have said bonds prepared and executed at once; to secure the payment of which, the president and secretary were directed to execute to a trust company a mortgage conveying all the real and personal property of the said company.

It is averred, that the indebtedness of the company did not exceed \$50,000.00, a great part of which was not due, and none of it pressing; that the property of the company was worth \$100,000.00; that it was wholly unnecessary to borrow money to carry on the business of the company, which was yielding a handsome profit; that

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no further improvements were necessary, and none contemplated to be then made, and complainant was informed that the remainder of said bonds, after reserving the number to secure the indebtedness, was to be given to the stockholders for their own use and benefit. It was further alleged, that said directors were about to issue \$100,000.00 of bonds and to give a mortgage on the company's property to secure the same.

The answer admits that the business of the corporation defrayed its expenses and yielded a profit, and by way of a general denial states, that further improvements on the plant were contemplated, but it did not state what such improvements were. It did not deny but admitted, that it was stated by directors, that after all existing indebtedness had been secured, the remainder of said bonds would be given to the stockholders for their individual benefit, yet there was no intention on the part of the directors to do so without the consent of each stockholder. It is also denied that there was, at the time of the answer, a present purpose to issue any amount of bonds, on account of the unfavorable condition of the money market. They also deny that complainant was turned out of the directory because of his opposition to the issuance of said bonds.

An injunction was granted enjoining defendants from issuing, as prayed in the bill, more than 50 bonds of the denomination of \$1,000.00 each, and from executing a mortgage on the property of the company to secure a greater indebtedness than said sum, etc.

The defendant demurred to the bill and moved to dismiss it for want of equity. Said motion and the demurrer were overruled.

The Constitution provides, § 234, that "No corporation shall issue stock or bonds except for money, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void." Section 1270 of the Code contains the same provision as to the issuance of stock and bonds.

In this case it is not denied that it was the purpose of the directors, as admitted by some of them, to issue the bonds to secure the indebtedness, and to distribute those remaining,—about \$50,000.00 worth,—to the

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stockholders, conditioned as is stated, in securing the consent of the stockholders. They deny, however, that such was their purpose at the time of making their answer. The fact is undisputed that the indebtedness of the company was about \$50,000.00, and none of it was pressing, and that the company was making a profit over all current expenses. It is also true, that complainant was turned out of the directory, shortly after he opposed the scheme of issuing bonds to be divided among the stockholders, and it is not stated, if that were important, that any improvements were in immediate contemplation of being made. The allegation of such as are referred to might be true, and yet such improvements might never be made. For this \$50,000.00 of bonds, proposed to be issued, above the indebtedness of the company, no money had been received or was due. If issued, the act of so doing, would have been directly against the Constitution and statute, providing that no corporation shall issue bonds except for money received, and making them void if so issued. The issuance of stock and bonds except for money are alike prohibited in the same clause of the Constitution and statute. As to issuing stock contrary to these provisions, this court uses language as applicable as if spoken concerning the unlawful issue of bonds: "It behooves constituted authority to keep well abreast with the many inventions which modern cupidity has wrought out, and which, perhaps, more than any other agency, have called into exercise pernicious principles, which threaten the overthrow of organized government. In this highly conservative, yet restraining spirit, the principle, constitutional and statutory, on which this case mainly hinges, had its origin and finds its justification. Let us not, by timid interpretation, impair the strength of this bulwark, erected by our constitution-makers against the frauds which have become the reproach of the age we live in."—*Fitzpatrick v. Dispatch Publishing Co.*, 83 Ala. 607.

Again it is said, "The constitutional provision in question operates to invalidate evidences of indebtedness when there is in fact no debt; to require every issue of stocks or bonds of private corporations to represent substantial values received by the corporations; to impose

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upon those charged with the disposition of corporate securities the duty to procure therefor a fair and reasonable equivalent in money, labor or property, actually contributed to the corporation. * * * * The negotiation of bonds must be a real transaction carried through to promote legitimate corporate purposes, and not a mere trick or device to evade the law and impose greater obligations upon the corporation than there is any occasion for it to assume in order to obtain the consideration received therefor."—*Nelson v. Hubbard*, 96 Ala. 250-1.

It would seem under these conditions, considering the relative degree of injury or benefit to the complainant and defendant, which may follow from the continuance of the injunction on the one hand, or its dissolution on the other, the chancellor, even if the dissolution or continuance of the injunction were a matter of doubtful propriety, might well have concluded that less damage or injustice would result from its continuance than from its dissolution.

The decree of the court must be affirmed.—*Mabel Mining Co. v. Pearson Coal & Iron Co.*, 121 Ala. 567.

Affirmed.

MCCLELLAN, C. J., DOWDELL and DENSON, J. J., concurring.

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Action of Assumpsit.

1. *Judgment of Elmore circuit court; invalidity thereof.*—A judgment rendered in the circuit court of Elmore county, which is convened at a time fixed by an act creating the 15th judicial circuit, which act is unconstitutional and void, and at a time different from that fixed by law prior to the passage of said act, is void, and an appeal therefrom will be dismissed.

APPEAL from the Circuit Court of Elmore County.
Tried before the Hon. TERRY RICHARDSON.

[Kidd v. Burke.]

This was an action brought by the appellee, M. Burke, against the appellant, Louisa V. Kidd, as executrix of the will of H. B. Tulane, deceased, and sought to recover on common counts for money on and received by defendant's testator for the use of plaintiff. There was verdict and judgment in favor of the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved. Under the opinion, it is unnecessary to set out the facts in detail.

GUNTER & GUNTER and F. W. LULL, for appellant.

No counsel marked for appellee.

TYSON, J.—The judgment from which this appeal is prosecuted was rendered by the circuit court of Elmore county on the 7th day of March, 1904. The record discloses that the court convened on the first Monday in March, it being the 7th day of said month. This was the time fixed by the Act creating the fifteenth judicial circuit and the Act known as the "Lusk Bill."—General Act, pp. 488-566. Both of these acts have been recently declared to be unconstitutional.—*Board of Revenue of Jefferson County v. Crow*, 37 So. Rep. 469; *State ex rel. v. Sayre* (in MS.)

The result of these decisions is that the county of Elmore was never legally detached from the counties composing the fifth judicial circuit and that it has all along remained in that circuit. So then, the time fixed for the convening of the spring term of the circuit court in that county was and is on the 8th Monday after the fourth Monday in February, which, in the year 1904, was Monday the 18th day of April.

We have here then a judgment rendered at a time not appointed by law for the holding of the court. When this is the case, the judgment is void for want of jurisdiction. *Ex parte Branch*, 63 Ala. 383; *Davis v. State*, 46 Ala. 80 and cases there cited; *Johnson v. State*, 37 So. Rep. 421; *Walker v. State*, 139 Ala. 56.

It is true, in *Lewis v. The Intendant and Town Council of Gainesville*, 7 Ala. 85, it was, in effect, said that

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such judgments were not void and, therefore, could not be attacked collaterally, but in *Wightman v. Karnser*, 20 Ala. 455, it was pointed out that this was *dictum*, and was there repudiated.

Appeal dismissed.

MCCLELLAN, C. J., HARALSON, DOWDELL, SIMPSON and DENSON, J.J., concurring.

Parks *et al.* v. Bryant *et al.*

Action to Recover Damages for Breach of Official Bond of Register in Chancery.

1. *Action upon official bond; sufficiency of plea.*—In an action upon an official bond of a register in chancery to recover money received by such register, and deposited to his credit in a bank, whereby it was lost to the plaintiff by reason of the bank's failure, a plea which sets up as a defense that the sum claimed was received by the register who preceded the defendant in the office and by him deposited in said bank, and that upon the defendant's coming into office, his predecessor gave him a check for said sum upon said bank, which check was placed to the credit of the defendant as register in chancery on the books of said bank, after which time the bank failed, presents no defense to the maintenance of the suit.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This suit was brought in said city court by C. F. Bryant and two others, against W. H. Parks, as the principal, and the United States Fidelity & Guaranty Company, as the surety, upon the official bond of said Parks as register in chancery for Montgomery county, to recover six hundred dollars for and on account of money of the plaintiffs alleged to have been received by said Parks as such register and by him deposited to his credit as such register in the banking house of Josiah Morris & Company, whereby the said money was lost to the plaintiffs. The bond sued on is the same as in the preceding

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case of The United States Fidelity & Guaranty Company against Union Trust & Savings Co., in the report of which case its contents are substantially set forth. The defendants each demurred to the complaint (as in the preceding case) and the demurrers were overruled by the court. Thereupon the defendants severally filed a number of pleas, the plaintiff's demurred thereto and the demurrer was sustained. Pleas 3 and 4 were identical and as follows: "That the sum claimed in the complaint was received in his official capacity by one V. M. Elmore, who was the predecessor of defendant Parks in the office of register in chancery of Montgomery county, Alabama; that on his retirement from said office, he gave to defendant Parks as his successor in office a check on the banking house of Josiah Morris & Co. for the money claimed in the complaint; that said Parks did not collect the said check, but had the amount named therein placed to the credit of said Parks, as register in chancery, on the books of said Josiah Morris & Co.; that shortly afterwards the said Josiah Morris & Co. suspended payment and defendant Parks has never received the money claimed in the complaint." The grounds of the demurrer, sustained to said plea, were, that the plea showed that Parks received the money in his official capacity as register; that the fact that he received it in the shape of a check constituted no defense; that the plea showed a breach of the bond sued on; that the plea showed that Parks as register did collect the check given him by his predecessor. The cause being submitted to the court on the evidence, judgment was rendered for the plaintiffs against the defendants for \$590.92 and costs. The assignments of error are based upon the rulings on the demurrers.

MARKS & SAYRE, for appellants.—The pleas setting up that the defendant Parks had received from his predecessor in office, Elmore, a check on Josiah Morris & Co. for the money sued for, and had deposited this check in said bank to his credit as Register, should have been upheld. Parks never received this money, and the effect of the transaction was a substitution of the credit of the bank for that of Elmore. Parks' action does not

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come within section 4668 of the Code. The conversion had already been made by Elmore, and the act being unlawful, the debt of the bank was to Elmore individually. Parks did not participate in the act by which Elmore gave the use of the money to the bank, nor did the money ever come into the hands of the former. See *City Council v. Hughes*, 65 Ala. 201; *Burge on Suretyship*, 69.

WATTS, TROY & CAFFEY, W. W. PEARSON and GORDON MACDONALD, *contra*.

DOWDELL, J.—All of the questions presented by the record in this case, except the one raised by demurrer to the defendant's third and fourth pleas, were considered in the case of *The United States Fidelity & Guaranty Co. v. The Union Trust & Savings Co.*, decided at the present term of this Court,, 38 South 177, and were there determined adversely to the contention of appellants.

The ruling of the trial court in sustaining the demurrers to pleas 3 and 4, remains only to be passed upon here. There was no error committed in sustaining the demurrers to these pleas.—*City National Bank v. Burns*, 68 Ala. 267, 275; *Alston v. State*, 92 Ala. 124; *Morse on Banks & Banking*, § 321; *National Bank v. Burkhardt*, 100 U. S. 689; *Oddie v. National City Bank*, 45 N. Y. 735; *Montgomery County v. Cochran*, 121 Fed. 17; *Id.* 126 Fed. 456.

There being no error in the record, the judgment will be affirmed.

Affirmed.

MCCLELLAN, C. J., HARALSON and DOWDELL, J.J., concurring.

[Rottenberry v. Brown, et al.]

Rottenberry v. Brown, et al.

Statutory Action of Ejectment.

- 1 *Ejectment; what necessary for plaintiff to recover; relevancy of deed to third party.*—In an action of ejectment, in order for the plaintiff to recover he must show that he had title at the commencement of the suit, and on to the time of the trial; and therefore a deed executed by the plaintiff prior to the institution of the suit, conveying the land to a third party, which deed was regularly acknowledged and recorded, is not subject to be excluded from evidence upon the ground that it was irrelevant.

APPEAL from the City Court of Birmingham.

Tried before the Hon. WILLIAM W. WILKERSON.

This was a statutory action brought by the appellant, John C. Rottenberry, against the appellees, Hiram W. Brown and W. M. Martin, to recover certain lands specifically described in the complaint. The plaintiff based his right of recovery upon the tax deed made by the State Auditor. The facts relating to the admission of a deed from the plaintiff to a third party prior to the institution of the suit, are sufficiently stated in the opinion.

The cause was tried by the court without the intervention of a jury, and upon hearing all the evidence the court rendered a judgment in favor of the defendant. The plaintiff appeals and assigns the rendition of this judgment as error.

DANIEL COLLIER and MARVIN T. ORMOND, for appellant.

WALKER, TILLMAN, CAMPBELL & WALKER, and W. M. MARTIN, *contra*.

SIMPSON, J.—This was a statutory action of ejectment, commenced January 29th, 1901, and the defendant introduced, in evidence a deed executed by the plaintiff

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and his wife on the 20th day of September, 1898, conveying the land in question to J. M. Rottenberry. No objection was offered to the introduction of this deed except on the ground that it was irrelevant, which was properly overruled. The deed was regularly acknowledged and recorded. No testimony was offered to show that J. M. Rottenberry had ever reconveyed said lands to plaintiff.

In order to recover in an action of ejectment, the plaintiff must show title at the commencement of the suit and on to the time of trial.—*Cofer v. Shening*, 98 Ala. 338; *Bruce v. Bradshaw*, 69 Ala. 360; *Scranton v. Ballard*, 64 Ala. 403.

The judgment of the court is affirmed.

MCCLELLAN, C. J., TYSON and ANDERSON, J.J., concurring.

Price v. Price.

Bill in Equity for Divorce.

1. *Divorce; when will not be granted on grounds of insanity.*

Where a bill is filed by a husband praying for a divorce from his wife upon the ground of her insanity, and it is shown that prior to the filing of the bill complainant and defendant had been married for 33 years and that soon after the marriage the complainant had notice of the conditions upon which it was sought to predicate insanity, it is proper for the court to decline to grant the divorce; the complainant having waited too late to proceed in the premises.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. RICHARD B. KELLY.

The bill in this case was filed by the appellant, E. B. Price against the appellee, Amanda Price, for the purpose of obtaining a divorce against the defendant. It was averred in the bill that the plaintiff and the defendant had been married for 33 years prior to the time of the filing of the bill; that at the time of the marriage,

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the said wife was insane, and had remained so up to the time of the filing of the bill. At the time the bill was filed, the respondent, the wife of the plaintiff, was hopelessly insane, and confined in the State Insane Asylum at Tuscaloosa. On the submission of the cause upon the pleadings and proof, the chancellor decreed that the complaint was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals and assigns the rendition thereof as error.

LACKEY & BOWLING, for appellant.—Cited 19 Am. & E. Enc. Law p. 1161 et seq., *Pike et al. v. Pike*, 104 Ala. 642; *Lewis v. Lewis*, 9 L. R. A. 505, (44 Minn. 124.), *Rawdon v. Rawdon*, 38 Ala. 565.

THOMAS L. BULGER, *contra*.—Cited *Rawdon v. Rawdon*, 28 Ala. 565.

McCLELLAN, C. J.—We do not commit ourselves to the proposition that the chancery court has jurisdiction to decree the annulment or declare the invalidity of marriage on the ground of insanity of a party or the parties at the time of solemnization; but assuming such jurisdiction to exist, we have no difficulty in concurring with the conclusion of the chancellor that this is not a proper case for its exercise. In the first place, if Mrs. Price was insane at the time of the marriage, the complainant has waited too long to file his bill: They were married thirty-three years before bill was filed. Soon after the marriage complainant had notice of the conditions upon which it is now sought to predicate insanity. It is too late now for him to proceed in the premises. But in the second place, the evidence fails to reasonably satisfy us that Mrs. Price was insane at the time of her marriage.

Affirmed.

HARALSON, DOWDELL and DENSON, J.J., concurring..

[Chapman & Co. v. Johnson.]

Chapman & Co. v. Johnson.

Registration of Mortgage.

1. *Mistake of officer recording it does not affect rights of mortgagee.*—Where a mortgage is duly filed for record in the office of the Judge of Probate, such filing is, under the provisions of the statute, (Code, 1896, § 987), operative as notice of the mortgagee's lien from the day delivered to the Judge, and a mistake of the officer in recording the mortgage does not affect the rights of the mortgagee thereafter, nor render the record of the mortgage ineffective as constructive notice to such subsequent purchasers for value.

APPEAL from the County Court of Geneva.

Tried before the Hon. W. O. MULKEY.

This was an action brought by the appellee against the appellants to recover damages resulting to the plaintiff by reason of the defendant purchasing two bales of cotton upon which plaintiff had a lien and thereby depriving the plaintiff of the enforcement of the lien. The facts of the case are sufficiently stated in the opinion. The cause was tried by the court without the intervention of the jury, and upon the hearing of all the evidence the court rendered judgment in favor of the plaintiff. From this judgment the defendants appeal and assign the rendition thereof as error.

W. R. CHAPMAN, for appellant.—Cited Code §§ 986, 987 and 991; *Sanders v. Knox*, 57 Ala. 80; *Hardaway v. Semmes*, 38 Ala. 657; *Pollak v. Davidson*, 87 Ala. 551; *Duppley v. Frenage*, 5 S. & P. 215; *DuRose v. Young, et al*, 10 Ala. 365; *Jones v. Parks*, 22 Ala. 446.

C. D. CARMICHAEL, *contra*.

DENSON, J.—The plaintiff, Johnson, held a mortgage which was executed to him by one, W. M. Newell

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on the 13th day of November, 1900, to secure an indebtedness of \$100.00. The mortgage was made payable the 1st day of October, 1901, and conveyed the crop of Newell for the years 1900, 1901, 1902 and 1903, grown on his farm in Geneva county. That part of the mortgage descriptive of the crops conveyed, was in the following words and figures, to-wit; "and the entire crop raised by me, or for me, or in which I may be interested during 1900, 1901, 1902 and 1903, in Geneva county, Alabama, or elsewhere." In recording the mortgage, the judge of probate wrote the part descriptive of the crops conveyed, as follows, to-wit; "and the entire crop raised by me, or in which I may be interested during the year 19— in Geneva county, Alabama, or elsewhere."

The mortgage was duly filed for record in the office of the judge of probate of Geneva county (the residence county of the mortgagor) on the 23rd day of November, 1900, as is shown by the following endorsement on the mortgage, namely, "Filed for record on the 23rd day of November, 1900, at 2 o'clock p. m., and recorded in Book 20, page 137 record of mortgages, Geneva county. Ed. Roach, Judge of Probate."

It is conceded by the parties to this controversy, that the only question which is presented for review by the record is, whether or not the mistake made by the judge of probate in the recordation of the mortgage, as above shown, rendered the record of the mortgage ineffective as constructive notice to subsequent purchasers for value.

Section 987 of the Code of 1896 was brought down from the Code of 1852 in almost the exact language in which it appears in section 1270 of that Code. This section provides, that a conveyance is operative as a record from the day of delivery to the judge.

In the first case in which this section of the Code was construed, that of *Mims v. Mims*, 35 Ala. 23, it appeared that a mortgage was executed in which the mortgagor acknowledged an indebtedness to the mortgagee in the sum of one hundred and twenty-two and 40-100 dollars, to be paid on or before the first day of May next, "*and the further sum of five hundred dollars, to be paid on or before the first day of January next.*" The mortgage

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was duly filed for record, but, the transcribing officer, in recording it, omitted the words which are italicised above, so that it appeared from the record to be a security only for the sum of \$122.40.

In the case of *Seibold v. Rogers*, 110 Ala. 438, it appeared that a mortgage was executed by J. W. Davis, but the transcribing officer recorded the name of the mortgagor as J. W. Cavis.

It was held in each case, that under the statute the mortgage was not impaired in its efficiency against subsequent purchasers, by the fact that there was a mistake made by the transcribing officers in making the record.

WALKER, C. J., in the opinion in the case first cited, reasons as follows: "The object and effect of the statute are clearly to place the conveyance, as soon as the grantee has discharged his entire part in procuring the record, by having it properly proved, or acknowledged and delivered to the officer, in the same attitude as if it were spread upon the record book. This statute relieves a party, who has done all that is devolved upon him by the law, from the consequence of the failure of the probate judge to discharge his duty, or of the imperfect manner in which he discharges it. The conveyance being operative as a record from its delivery to the judge, no subsequent mistake of his could deprive it of the operation thus given it by the law."

In the case in 110 Ala. *supra*, the court said; "The delivery of the instrument to the probate judge for record was all that was required of the plaintiff (mortgagee), to give notice of his lien. He was not required to supervise the act of the probate judge in recording the paper, and hence it is immaterial as far as the plaintiff's rights are concerned, that the recording officer committed an error in writing the mortgagor's name Cavis instead of Davis upon the mortgage record." It is further stated by the court, substantially, that the conclusion reached could not be otherwise without disregarding the express language of the statute.—*Leslie v. Hinton*, 83 Ala. 266; *Fouche v. Swain*, 80 Ala. 151; *Heflin v. Slay*, 78 Ala. 180; *McGregor v. Hall*, 3 Stew. 397.

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The case of *Sanders v. Knox*, 57 Ala. 80, was a suit of trover for the conversion of two bales of cotton, the plaintiff's title was evidenced by a mortgage executed by Barr and his wife and one Stubbs. The defendant, after plaintiff had offered this mortgage in evidence, offered in evidence the record of the mortgage, which showed that the signatures of the makers had been omitted by the recording officer in recording the mortgage, and thereupon the defendant moved the court to exclude the mortgage as evidence, on the ground that it was illegal and irrelevant. The motion was overruled. On appeal, the court, through BRICKELL, C. J., said: "The defects in the registration of appellee's conveyance, destroy its effect as notice to purchasers, or creditors with a lien, protected by the statute of registration."

In that case the court's attention seems not to have been directed to the statute we have under consideration, which was at that time, § 1539 of the Code of 1867. Nor did the court consider the case of *Mims v. Mims*, *supra*, but the cases of *Jones v. Parks*, 22 Ala. 446 and *Dubose v. Young*, 10 Ala. 365, were cited as authorities for the ruling. It will be discovered by an examination of the cases cited by Judge BRICKELL, that they were decided without reference to the statute; hence those cases could hardly be regarded as authority upon the question now in hand. But the case of *Sanders v. Knox*, *supra*, having been decided after the enactment of the statute, must be considered as bearing upon the question and is in conflict with the cases of *Mims v. Mims*, and *Seibold v. Rogers*, *supra*.

In other states that have a like statute to ours, the courts of those states have held, in line with the case of *Mims v. Mims*, *supra*, that mistakes made by the recording officer do not affect the mortgagee's rights.—*Menick v. Wallace*, 19 Ill. 486; *Polk v. Cosgrove*, 4 Biss. 437, *Riggs v. Baylon*, 4 Biss. 445; *Tonsley v. Tonsley*, 5 Ohio St. 78; *Wood's Appeal*, 82 Pa. St. 116; *Sinclair v. Lawson*, 44 Mich. 123; 24 Am. & Eng. Ency. Law, (2nd ed.) p. 114. and cases cited in note 3; *Jones on Mortgages*, (3rd ed.) § 552.

The conclusion is, that the statute was correctly construed in the cases of *Mims v. Mims*, and *Seibold v. Rogers*.

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ers, supra, and *Eufaula National Bank v. Pruet*, 128 Ala. 470. It follows that, in so far as the case of *Sanders v. Knox, supra*, conflicts with the ruling here, it must be overruled.

There is no error in the record, and the judgment of the circuit court must be affirmed.

Affirmed.

MCCLELLAN, C. J., HARALSON, TYSON, DOWDELL, SIMPSON and ANDERSON, J.J., concurring.

Dennis *et al.* v. Currie.

Bill in Equity to have a Mortgage declared Void.

- 1 *Appeal; from decree on demurrer must be prosecuted within 30 days.*—If an appeal from a decree upon a demurrer to a bill in equity is taken after the expiration of 30 days from the rendition thereof, the Supreme Court is without jurisdiction to entertain such appeal, and the same will be dismissed.

The facts of this case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

HILL, HILL & WHITING, for appellant.

WILLIAM W. QUARLES, *contra*.

ANDERSON, J.—This appeal is prosecuted by the respondents from a decree of the chancellor overruling their demurrer to the bill of complaint.

Section 427 of the Code of 1896, giving the right of appeal in this cause, provides that the appeal must be taken within thirty days. The decree was enrolled June the 6th, 1903, and the appeal was taken July 7th, 1903, on the 31st day.

This court is without jurisdiction to entertain this appeal and the same is hereby dismissed.—*Blackburn v. H. Mfg. Co.*, 135 Ala. 598; *Lide v. Park*, 132 Ala. 222. Appeal dismissed.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concur.

[Morris v. Bank of Attalla.]

Morris v. Bank of Attalla.*Action of Trover.*

1. *Mortgage; effect of usury as to bona fide purchaser.*—A stipulation for usurious interest upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a *bona fide* purchaser without notice as to outstanding equities in third parties; and as against such mortgagee, the holders of outstanding equities are entitled to the same measure of relief as they would have been against the mortgagor had not the mortgage been executed.
2. *Trover; admissibility in evidence of usury in mortgage debt.* In an action of trover brought by a mortgagee to recover damages for alleged conversion of the property conveyed in the mortgage, where the defendant sets up the defense that he had a lien upon the property in controversy by reason of a mortgage which was executed prior to the mortgage to the plaintiff, but which was not recorded, the fact as to whether the plaintiff's debt secured by the mortgage was tainted with usury, is a material inquiry, and testimony tending to show that there was usury in such debt, should be admitted when offered by defendant.
3. *Execution of written instrument by making mortgage; not invalid when attesting witness, agent or employee or mortgagee.*—Where in the execution of a mortgage, the mortgagor signs the same by making his mark, the fact that the attesting witness was an agent or employee of the mortgagee, does not render the mortgage invalid.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. J. A. BILBRO.

This was an action of trover brought by the appellee, the Bank of Attalla, against the appellant, E. A. Morris, to recover damages for the alleged conversion of certain cotton, a part of the crop on which the plaintiff held a mortgage executed to it by one S. T. Massey. Upon the plaintiff offering to introduce in evidence the note and mortgage which was the foundation of its claim, the defendant objected upon the ground that said note and mortgage were not properly attested. It appeared that

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the note and mortgage were signed by S. T. Massey, making his mark, and that said note and mortgage were attested by one J. H. Lester, who was the cashier of the plaintiff's bank and a stockholder in said bank. The court overruled this objection and the defendant duly excepted. This note and mortgage was dated Jan. 9th, 1902.

The defendant set up as a defense that he was entitled to the cotton alleged to have been converted by reason of a mortgage which was executed by the said S. T. Massey to a partnership of which the defendant was a member; that this mortgage was executed on Jan. 6th, 1896. and conveyed the crop to be grown by the said Massey during the year and every year thereafter until the mortgage debt was paid in full; and the defendant testified that said debt had never been paid. The defendant also testified that the said Massey had executed several notes and mortgages the succeeding years to secure an indebtedness to his firm, and that these notes and mortgages were given prior to the execution of the mortgage to the plaintiff. It was shown by the testimony that none of the mortgages given by Massey to the defendant, or to the defendant's firm, had been recorded. The plaintiff objected to the introduction in evidence of each of these mortgages upon the ground that no one of the mortgages had been recorded, and that the plaintiff had no notice of the existence of said mortgage at the time it took its mortgage from the said Massey. The court sustained the objection, but permitted the mortgage to be introduced merely as evidence of the indebtedness. To this ruling the defendant duly excepted.

In connection with the introduction in evidence of the several mortgages, the defendant offered to show that there was usury in the debt from said S. T. Massey to the Bank of Attalla, which was secured by the mortgage through which plaintiff claimed title to the cotton in controversy, and that, therefore, the plaintiff could not claim protection of the statute requiring the mortgage to be recorded. The plaintiff objected to the introduction of this evidence, and to such ruling the defendant separately excepted.

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There were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court, to which exceptions were reserved.

M. L. WARD, for appellant.—The mortgage was not properly executed, because the attesting witness was the cashier and a stockholder in plaintiff's bank.—*Johnson v. Davis*, 95 Ala. 293; *Mash v. Daniel*, 105 Ala. 393; *Long v. Slade & Farrish*, 121 Ala. 267; *Houston v. State*, 114 Ala. 15. The defendant should have been allowed to show that the mortgage was tainted with usury.—*McCall v. Rogers*, 77 Ala. 349.

EMERY C. HALL, *contra*.—The evidence showed a valid execution of the note and mortgage.—*Carlisle, Jones & Co. v. Campbell*, 76 Ala. 247-249; *Mash v. Daniel & Co.*, 105 Ala. 393-395; 4 Mayfield's Digest, p. 831.

The question of usury in the debt due the plaintiff could in no way affect its rights as a creditor under the registration statute. Therefore, the court did not err in refusing to allow the unrecorded mortgage to be introduced in evidence.—Code of 1896, § 1009; *Chadwick v. Russell*, 117 Ala. 290-291.

MCCLELLAN, C. J.—To a recovery in this case it was necessary for plaintiff to prove that it had, as against the defendant, title to the cotton in question under its mortgage of January 9th, 1902. If, as the evidence defendant offered would have shown, Massey, plaintiff's mortgagor, had executed mortgages on this cotton prior to January 9th, 1902, which were unsatisfied at the time of the conversion and which as between Massey and defendant vested the title, legal or equitable, in the latter, their title was superior to that of plaintiff under its subsequent mortgage unless the plaintiff could claim protection against defendant's prior mortgage as a *bona fide* purchaser for value without notice. This the plaintiff could not do if the debt to secure which it took the mortgage of January 9th 1902 was constituted in any part of usury: In that contingency the Bank of Attalla, the plaintiff, was not "a purchaser without no-

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tice," nor a creditor without notice within the meaning of section 1009 of the Code.—*Southern etc. Association v Riddle*, 129 Ala. 562, and authorities there cited. It was therefore a material inquiry on the trial whether plaintiff's said debt was tainted with usury, and the circuit court erred in excluding the evidence offered by the defendant to prove that it was so tainted.

With this evidence in or along with it on another trial, the defendant should, of course, be allowed to prove and introduce any mortgage, prior in date to plaintiff's mortgage, he may have had on this property at the time of the alleged conversion.

We are not of opinion that Massey's signature by mark and attestation to the mortgage of January 1902 to plaintiff was invalidated by the fact that the attesting witness was an agent or employe of the mortgagee.

Reversed and remanded.

HARALSON, TYSON and DENSON, J.J., concurring.

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Quo Warranto Proceedings.

1. *Constitutional Law; act creating fifteenth judicial circuit; local law and unconstitutional.*—The Act of the Legislature, approved October 13, 1903, "to create the fifteenth judicial circuit of the State of Alabama, to be composed of the Counties of Autauga, Chilton, Elmore and Montgomery," is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply for the passage of this law not having been given as provided by section 106 of the Constitution, such law is void and unconstitutional.

This was a proceeding in the nature of *quo warranto*, and was commenced by an original petition filed in the Supreme Court. The petition was in words and figures as follows:

[State *ex rel.* Attorney General v. Sayre, as Judge, etc.]

"To the Honorable Supreme Court of Alabama: Massey Wilson, Attorney General of Alabama, who, for and in the name of said State, in this behalf prosecutes in his own proper person, comes into the said Supreme Court at Montgomery, on the 30th day of November, 1904, and for the said State, gives the Court to understand and be informed, as follows, to-wit:

(1.) "That the Legislature of Alabama, at the last session thereof, attempted to enact a statute entitled, 'An act to create the fifteenth judicial circuit of the State of Alabama, to be composed of the counties of Autauga, Chilton, Elmore and Montgomery; to confer equity jurisdiction on said Court in the Counties of Autauga, Chilton and Elmore, and to provide for the appointment of a judge and solicitor of said circuit.' (General Acts, 1903, p. 488); that a bill to that end was introduced into the Senate, and after having passed through all of the parliamentary stages, was duly passed by the Senate as required by the Constitution, and was transmitted to the House of Representatives, and after having passed through all of the parliamentary stages required by the Constitution, was duly passed by the House of Representatives, and was signed in the mode required by the Constitution by the presiding officers of the two Houses, and was approved by the Governor in the manner, and within the time, required by the Constitution; but relator avers that said bill was a local bill, or bill the object of which was to enact a local law, within the meaning of section 110 of the Constitution, and that said bill is, for that reason, unconstitutional and void, and that said bill never became a law.

(2.) "That at the general election held in this State on, to-wit: the eighth day of November, 1904, said T. Scott Sayre was voted for and declared elected to the office of Judge of the Fifteenth Judicial Circuit of Alabama; that he has attempted to qualify as such Judge by taking the oath prescribed for a Judge of the Circuit Court in this State, and that the Governor has issued to him a commission as such Judge; that there is no such office as Judge of the Fifteenth Judicial Circuit of Alabama; that there is no valid statute of this State creating such an office; that said void and unconstitutional

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Act attempted to create such a circuit composed of the Counties of Autauga, Chilton, Elmore and Montgomery, and to provide a judge therefor; that said T. Scott Sayre has exercised, and still continues to exercise, the liberties and privileges, and to perform the duties, pertaining to the office of the Judge of the Circuit Court in the Counties of Chilton, Elmore and Autauga, and is unlawfully holding and exercising the duties of said office in said counties; and that no other Circuit Judge is exercising any of the powers, or performing any of the duties, of said office in said counties.

"Wherefore, said Attorney General, in the name of and on behalf of the State of Alabama, prays that process may issue requiring the said defendant, T. Scott Sayre, to answer and show by what authority he claims to exercise and enjoy the powers, liberties and duties of the office aforesaid in the Counties of Elmore, Chilton and Autauga; and that upon the hearing, a judgment be rendered excluding him from the said office, and that all further proper relief be granted."

The answer of the defendant was in words and figures as follows:

"Now comes T. Scott Sayre, the defendant in the above proceeding, and for answer to the information therein filed against him, says:

(1.) "He admits the due passage of the Act of the Legislature referred to in paragraph one of the information, and that the same was duly approved by the Governor in accordance with law.

(2.) "Respondent admits that at the general election held in this State on the eighth day of November, 1904, he was voted for for Judge of the Fifteenth Judicial Circuit, having received all the votes cast in the counties of Montgomery, Autauga, Elmore and Chilton for said office, and that he has been duly declared by the proper authority to have been elected to said office. Respondent further admits that he has qualified as such Judge by taking the oath of office, and that the Governor of Alabama has duly issued to respondent a commission to hold said office and discharge the duties thereof.

(3.) "Respondent admits that he has exercised and is now exercising the liberties and privileges, and has

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performed and is now performing the duties pertaining to the office of Judge of the Circuit Court in and for the Counties of Autauga, Chilton and Elmore.

(4.) "Respondent admits that no notice of the intention to introduce the bill which was enacted as the Act referred to in paragraph one of the information was given by publication.

(5.) "Respondent denies that the Act of the Legislature referred to in paragraph one of the information filed in this cause is a local law.

(6.) "Respondent denies that the Act referred to in paragraph one of the information, under which Act this respondent is now exercising the functions of a Circuit Judge, is invalid. He further denies that he is unlawfully holding and exercising the duties of such office."

MASSEY WILSON, Attorney-General for the State. The law is local, within the meaning of the constitutional definition of a local law. It applies to certain political subdivisions of the State less than the whole, to-wit: to the Counties of Autauga, Chilton, Elmore and Montgomery. Being so limited in its application, it is within the very terms of the definition of a local law found in the Constitution.

This provision of the Constitution evidently has reference to the territorial application of statutes, and not to their subject matter. Any statute which is expressly limited in its territorial application to less than the whole State, is necessarily local. Such a statute may be public, but it is none the less local. The definition in the Constitution of general, local, and special or private laws, bears such a close resemblance to some of the expressions of the Court, in the opinion in *Holt v. Mayor*, 111 Ala. 369, as to force the conclusion that the Convention had that decision in mind, and meant to adopt it, when formulating the definition referred to.

Tested by the principle quoted, the act under consideration is a public local law. It certainly does not operate alike on the people all over the State as it operates

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in Autauga, Chilton, Elmore and Montgomery Counties, and is, therefore, local; it does not operate alike on all within those counties, and is, therefore, public.

The distinction drawn in *Holt v. Mayor*, *supra*, between public laws on the one hand, and general and local laws on the other, has also been made in many other jurisdictions.—26 Am. & Eng. Ency. of Law, 2 Ed., p. 532; *State v. Chambers*, 93 N. C. 600; *Kernigan v. Force*, 68 N. Y. 381.

This Court has correctly decided that a law is local, within the meaning of the Constitution, if it applies to less than the whole State, although its purpose may be to establish a Court which may have an indirect bearing upon the whole State.—*Wallace v. Jefferson County*, 37 South 321.

T. SCOTT SAYRE, *contra*.

HARALSON, J.—The purpose of the proceeding is to test the constitutionality of the Act of the Legislature, "To create the Fifteenth Judicial Circuit of the State of Alabama, to be composed of the counties of Autauga, Chilton, Elmore and Montgomery," etc.—Acts 1903, p. 488.

Section 103 of the Constitution provides, that "No special, private or local law shall be passed on any subject not enumerated in Section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the State, in the county or counties where the matter or thing to be affected may be situated,"—for a time and in a manner specified. +

No notice of an intention to apply for the passage of this law was ever published. If the law is local, it is void for want of such notice, unless it is excepted from the provisions of said section by some other provision of the Constitution.

Section 110 of the Constitution defines a general, local and special law thus; "A general law within the meaning of this article is a law which applies to the whole State; (in which section 106 is included) a local law is *

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a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this article is one which applies to an individual, association or corporation."

* The term "general law," and "special and local law," were used in the Constitution of 1875, § § 23, 24, 25, 50, and this court had occasion before this present Constitution was adopted to define the meaning of a general law.

The term in the two Constitutions is identical in meaning. The court said, "In specifying the limitations upon the powers of the legislative department, (Art. IV. § § 23, 24, 25 and 50,) the Constitution uses the term 'general laws.' A proper construction of these constitutional provisions would exclude the definition of a 'public statute' as distinguished from a general statute, that is a statute operating upon the public within the limits of a locality, less than the whole State. The terms, 'general law' and 'public law' are frequently used synonymously, but they are not the equivalent of each other. Every general law is necessarily a public law, but every public law, as defined, is not a general law. A 'general law', as used in our constitution, is a law which operates throughout the State, alike upon all the people or all of a class. * * * * Any law affecting the public within the limits of the county, or community, would be a public law, though not a general law within the meaning of our constitution. The effect of a statute, more than its wording or phraseology, must determine its character as a public, general, special or local statute."—*Holt v. Mayor and Aldermen of Birmingham*, 111 Ala. 372-3.

It has been said "The term 'local' as applied to statutes is of modern origin, and is used to designate an act which operates only within a single city, county or other particular division or place, and not throughout the entire legislative jurisdiction. In this sense, the term 'local' is the antithesis of 'general'."—26 Am. & Eng. Ency. Law, (2nd ed.) 532; *State v. Chambers*, 93 N. C. 600; *Kerrigan v. Force*, 68 N. Y. 381.

[State *ex rel.* Attorney General v. Sayre, as Judge, etc.]

In a recent decision, after much deliberation, we held, that a law is local, within the meaning of the Constitution, if it applies to less than the whole state, although its purpose may be to establish a court which may have indirect bearing upon the whole state.—*Wallace v. Jefferson county*, 37 Sou. 321. This is eminently true of the city courts established in different counties of this state, constituting as they do, important agencies in the administration of justice in the state, applicable to all the people in the state, who come within their jurisdiction, and yet, no one can be heard to say, that the several acts by which they were created, were general or other than local laws.

The framers of the present Constitution, had much to do with local laws, and specified 31 instances in which the Legislature should not pass a special, private or local law.—§ 104. It became important, therefore, as was supposed, to define a general, local, special or private law, and they did it in section 110, having in mind, it may be presumed, the definition of such laws, as given by adjudications, especially by our own court. It appears to be beyond question, as has been suggested, that when the Constitution defines a general law to be one that applies, to the whole state, and that a local law is one which applies to any particular subdivision or subdivisions of the state less than the whole, it has reference to statutes in their territorial application, and not in their subject-matter. If the framers had designed to make this so plain that it could not be disputed, it is difficult to see how they could have devised language more apposite for the purpose, than the very language they employed. No obscurity or ambiguity has been or can be suggested in the language of this provision. Such being the case, there is no room for construction. Possible or probable meanings, the courts are not at liberty to search for. All arguments drawn from inconvenience to the public, or from a supposed lack of wisdom or even foolishness, on the part of the framers of the Constitution in the framing of such a provision, are at once silenced. "We can only know what they intended, from what they have said. It is theirs to command, ours to obey. When their language is plain, no

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discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for imaginary purposes."—*Ichman v. Robinson*, 59 Ala. 241; *State v. McGraw*, 118 Ala. 166; 6 Am. & Eng. Ency. Law, (2nd ed.) 921.

The fact that circuit courts are of constitutional creation, and that the law in question did not create the court, in the 15th circuit, since the court already existed in the several counties, without the aid of the statute, seems to be without force on the question at issue. The statute did not attempt to create the court. The contention is, not that the court, as a circuit court, did not exist, but in the effort to take the court of these counties out of circuits to which they properly belonged under the general law, and constitute them into a new and additional circuit, was an act of local legislation not forbidden, if done according to the provisions of the Constitution, to make local legislation valid. It is a mistake to argue, that new circuits may not be created by local legislation if done under and not offensive to the notice provision. If the statute is a local one, as we hold it is, the whole of the defendant's difficulty grows out of the fact, that the required notice of an intention to apply for the passage of the law was not given, and not from the fact that such legislation may not be had when the requirements of the Constitution therefor, are complied with. According to reason and authority, we conclude that the statute was a local one.

Not much remains to be said, as to the want of notice of an intention to apply for the passage of the law. The terms of the Constitution above quoted are plain and mandatory, *that no local law shall be passed on any subject unless the prescribed notice is given.* / It is argued, that the legislature is commanded by the Constitution to divide the state into convenient circuits, and that this necessarily means the exercise of legislative discretion in the premises, and that when a duty is laid upon the legislature to enact legislation of a particular character, the notice provision is not applicable. But this is not a sound construction of the notice provision. It is too broad. It is the duty of the state by general law to divide the state into convenient and proper circuits and

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to adopt local legislation, even, to that end, when all the conditions for the adoption of such measures are complied with, and it seems proper that it should be done. Discretion may exist when duty is imposed, however, when the manner of its exercise is not forbidden and the duty is not prescribed in mandatory terms. While it was the duty of the Legislature to pass the law in question, if it appeared to be the wise thing to do, yet it could never have been its duty to adopt the measure without a compliance with the notice provision. The argument on this point seems to proceed on the line, that it was the imperative duty of the state to adopt the measure, and it was not limited by the notice provision. But no such duty as that is required, and the argument breaks down at this point. The Legislature might well have refused to enact the measure, on the supposed idea that it was better for the counties composing the new circuit, to have their courts held under the old and general law, dividing the state into convenient circuits. The fact that the state could not be required to give the notice, is of no importance. If the state could not pass the law without the notice, then it would have to be given by some one before the state could properly act, and the apprehension need never be indulged that those concerned for such legislation will not give the necessary notice. If it be said, as it has been, that great evils may overtake the state, if notice be required in a case of this kind, the reply is, it might not be difficult to show that greater ones may arise, if it is not required.

Decisions of other courts have been brought forward, tending to sustain the contentions of the defendant. Whether the constitutional and statutory provisions of those states bearing on the question, are the same as ours, we need not stop to consider. It is sufficient to say of our Constitution, that its terms are so plain and mandatory, we feel closed by its provisions, and can discover no escape from holding the law to be unconstitutional. A proper judgment of ouster of defendant from office he claims to hold, will be entered.

Ouster awarded.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

TYSON, DOWDELL and DENSON, J.J., dissenting.

[Continental Insurance Co. v. Parkes.]

Continental Insurance Co. v. Parkes.*Action upon Fire Insurance Policy.*

1. *Pleading and practice; what plea insufficient.*—A plea filed to a complaint upon a fire insurance policy which merely alleges that the plaintiff ought not to recover in the action upon the contract sued on by reason of anything alleged in the complaint is demurrable because it neither denies nor confesses and avoids the allegations of the complaint.
2. *Same; same; pleas alleging conclusions of law and not statement of facts.*—In an action upon a fire insurance policy a plea alleging that in and by the terms of the policy it is provided that the contract may be cancelled, and that in accordance with the terms of the policy in regard to cancellation the said policy was cancelled by the defendant before the loss occurred, merely alleges the conclusions of the pleader and is demurrable for failing to set out the terms of the policy sued on so that the court could determine the right of defendant to cancel and thereby terminate its liability thereon.
3. *Same; same.*—A plea alleging that defendant did not issue any policy to plaintiff but that it did issue one to plaintiff's husband which subsequently was cancelled and surrendered is a plea of *non est factum* and must be sworn to.
4. *Same; same; when plea insufficiently alleges notice to assured of intention to cancel policy.*—In an action upon a fire insurance policy one of defendant's pleas alleged that the policy was originally issued to the husband of the plaintiff and loss if any, was made payable to R. M. as mortgagee as his interest might appear. That afterwards said R. M. returned said policy to defendant's agent and had same changed so that plaintiff became the assured and J. M., the wife of the said R. M., was named as mortgagee and loss, if any, made payable to her as such mortgagee as her interest might appear, and that the said J. M. then took possession of said policy and it was not thereafter in the possession of the plaintiff. That by the terms of said policy defendant on notice for the space of five days had the right to cancel said policy and that subsequently said defendant did give notice to the said J. M. that it would cancel said policy and the said J. M. thereupon surrendered said policy to the defendant and the same was cancelled by

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defendant before the loss occurred. Held: that said plea is fatally defective in failing to show notice to the assured of defendant's intention to cancel the policy. Held further, that notice to the mortgagee would not be sufficient notice to entitle defendant to cancel, but such notice must have been to assured.

5. *Same; same; right of Insurance Company to cancel policy strictly construed against Company.*—A provision in an insurance policy reserving to the insurer a right to cancel same is strictly construed and the conditions imposed upon it with respect to giving notice of cancellation must be strictly performed.
6. *Same; same; what sufficient notice of loss to an insurance company.*—Where a policy of insurance provides that if a fire occur the insured shall give immediate notice of any loss thereby in writing to the company, an allegation that the insurance company had actual notice of the loss within forty-eight hours after the fire is not a sufficient allegation of notice by the insured.
7. *What considered not a waiver of provision in policy requiring notice of loss.*—Where a policy of insurance provides that if a fire occurs the insured shall give immediate notice of any loss thereby in writing to the Company, a statement by the local agent of the Company to the assured that the policy had been cancelled before the loss and that the Company denied liability thereunder does not constitute a waiver by defendant of the notice required by the policy unless the agent had authority to bind the Company by his statement.
8. *Statutory provision that Insurance Company belonging to a tariff association pay penalty not unconstitutional.*—Section 2619 of the Code of Alabama providing that in case of loss an insurance policy issued by an insurer who belonged to or was a member of or in any wise connected with any tariff association or such like thing by whatever named called, etc., shall be construed to mean that the assured or beneficiary thereunder may in addition to the actual loss or damage suffered recover 25 per cent. of the amount of such actual loss, any provision or stipulation to the contrary in the policy notwithstanding is a legitimate exercise of the police power of the State.
9. *Same.*—Such statutory provision is not violative of the constitutional provision for singling out particular persons or corporations and discriminating against them.
10. *Same; said provision applies to foreign Insurance Companies as well as domestic.*—The fact that the insurer happens to be a foreign corporation does not render the provision unconstitutional or void as to it.

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11. *Same; same; insurance companies are not engaged in inter-state commerce.*—Insurance companies organized in other states and issuing policies in this State are not engaged in inter-state commerce, nor are the contracts of insurance entered into by such companies in this State inter-state transactions.
12. *Authority of agent to waive written notice provided for in policy; when such authority question of fact for the jury.* Where the local agent of an insurance company performs acts at various times not expressly conferred by the instrument appointing it as agent and such acts were recognized by the principal as within the authority of the agent and were not repudiated by it, it is a question of fact for the jury to determine whether or not the agent had authority to waive for defendant company a provision in the policy requiring written notice of loss to be given immediately after a fire occurred.
13. *Same; what sufficient waiver of notice.*—If the local agent had authority to bind its principal a distinct denial of defendants liability because the policy had been cancelled would be a waiver of notice and proof of loss required of the assured by the policy.

APPEAL from the City Court of Birmingham.

Tried before the Hon. WILLIAM W. WILKERSON.

This action was brought by the appellee against the appellant to recover upon a policy of fire insurance. The defendant pleaded the general issue and in addition thereto many special pleas among which special pleas were the following: 8. "And for further plea in this behalf the defendant says the plaintiff ought not to recover in this action upon the contract sued on by reason of anything alleged in the complaint.

9.—And for further answer this defendant says that in and by the terms of the policy described in the complaint it is provided that the contract named in the complaint may be cancelled. And this defendant says that in accordance with the terms of said policy in regard to cancellation, this defendant before the loss described in the complaint had occurred had cancelled and taken up the said policy and it was no longer in force, wherefore this defendant says that plaintiff ought not to have and recover in this action.

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10.—And for the further answer to the complaint this defendant says that it never did issue any policy to Margaret N. Parkes, the plaintiff; that it did issue to one A. B. Parkes a policy of insurance of date October 29th, 1898, upon a certain dwelling house and furniture therein, with condition loss if any payable to Robert Mauchlin, mortgagee. That afterwards the said policy on the demand of this defendant notice of cancellation having been previously given was surrendered on to-wit, the 1st day of September, 1899, to this defendant and was duly cancelled and returned to this defendant and defendant says that for to-wit thirty days prior to the loss named in the complaint there was no policy issued by it in force, wherefore this defendant says that plaintiff ought not to have and recover by reason of any transaction in regard to said policy of insurance.

15.—Defendant says for answer to the complaint that on to-wit, Nov. 1st, 1898, this defendant issued to one A. B. Parkes a policy as described therein upon the property mentioned in the complaint upon his two story house valued at \$1,800.00 and upon the furniture therein valued at \$1,000.00, the said A. B. Parks being then the husband of plaintiff, that in and by the terms of the said policy loss if any made payable to Robert Mauchlin as mortgagee as his interest might appear, that afterwards on to-wit, Nov. 25th, 1898, the said Robert Mauchlin came into the office of the agent of defendant in Birmingham, Alabama, bringing said policy with him, and stated, that M. N. Parks was the owner of the property insured and that the name of the mortgagee was Janette Mauchlin and then and there the secretary of defendants agent one Charles Mell, at the instance of said Robert Mauchlin the said Mell then and there having authority of the defendant to do so attached to the face of said policy a green printed slip, stating in effect that M. N. Parks should be the name of the assured and that loss, if any, payable to Mrs. Janette Mauchlin as her interest may appear, that there was then present only the said Robert Mauchlin and the said Mell, that said Robert Mauchlin took away with him the said policy so changed, and defendant says that thereafter, the said Janette Mauchlin kept possession of said policy of insurance and it was

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not thereafter in the possession of plaintiff; that by the terms of said policy defendant on notice for the space of five days had the right to cancel said policy, and that defendant on to-wit, August 24th, 1899, gave notice to Janette Mauchlin that it would cancel said policy, and on to-wit September 1st, 1899, on demand of the defendant the said Janette Mauchlin the mortgagee named in the said policy so altered surrendered said policy to the defendant and the same was by this defendant duly cancelled.

Wherefore defendant says that, at the time when the said property alleged to have been insured was burned the said policy was not in force and plaintiff ought not to recover."

There was evidence introduced tending to show that the local agent of the defendant company had at various times performed acts not expressly conferred by the instrument appointing it as agent, which acts were not repudiated by the defendant company. There was evidence also introduced on behalf of the plaintiff which tended to show that the defendant company was connected with or a member of a tariff making association. There was other evidence introduced on behalf of defendant tending to show that it was not a member or in any wise connected with any such association.

There were verdict and judgment in favor of the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved.

WARD & HOUGHTON, for appellant. (No brief came to the hands of the reporter.)

WHITE & SONS, *contra*.—Where conditions are pleaded they must be clearly and distinctly averred. Chitty on Pleading, Volume 2, page 367, 16 Ed.; Enc. Pl. & Prac. Vol. 2, page 422; *Mead v. Hughes*, 15 Ala. 141.

The plea averring that the policy by its terms could be cancelled after giving five days notice alleges that defendant had cancelled it without giving such notice to the assured, and is not sufficient.—1 Biddle on Ins.

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section 372; 2nd May on Ins. section 356a. Notice of cancellation must be unambiguous and must show an unconditional and fixed determination to cancel and not a mere desire to cancel.—1st. Biddle on Ins. section 371.

Section 2619 of the Code is valid and not unconstitutional. Tiedeman on Limitation of Police Power, page 251-315; *State v. Phipps*, 50 Kan. 699, 31 Pac. 1078, 18 L. R. A. 657, 34 Am. St. Rep. 152; *Hartford F. Ins. Co. v. Raymond*, (Mich.) 38 N. W. Rep. 474; *Youngblood v. Bg'ham. T. & S. Co.*, 95 Ala. 521; *Am. Ins. Co. of Chicago v. Isaac Stay*, (Ill.) 1 N. W. Rep. 877; *Stripling's case*, 113 Ala. 120; *Am. Co. v. Western Co.*, 67 Ala. 26; *Mortgage Co. v. Ingram*, 91 Ala. 340; *Collier v. Davis*, 94 Ala. 456; *Ex Parte Byrd*, 84 Ala. 17; *Steiner v. Ray*, 84 Ala. 93; *Cook v. State*, 110 Ala. 40; *Munn v. Illinois*, 94 U. S., 113; *United States v. Jellico*, 46 Fed. Rep. 432, 12 L. R. A. 753; *State v. Firemen's Ins. Co.*, 152 Mo. 1.

That no Federal question is involved, and that this statute is not violative of the Federal Constitution, see, *Paul v. Virginia*, 8 Wall. 168; *Osborne v. Mobile*, 16 Wall. 479; *Munn v. Illinois*, 94 U. S. 113; *Steiner v. Ray*, 84 Ala. 93; *Merriman v. Knox*, 99 Ala. 94.

Notice of loss given to local agent of defendant company was sufficient notice to the company; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176; Biddle on Ins. Vol. 2, Sec. 1073-1078; *Nichol v. Ins. Co.*, 144 Mo. 420; *Wadham v. Western Ins. Co.*, 117 Mich. 514; *Bernero v. Ins. Co.*, 4 Pac. Rep. 382; *German Fire Ins. Co. v. Stewart*, (Ind.) 42 N. E. Rep. 286; Federal cases Number 1321, 14 Blatch. 422; *Harnden v. Milwaukee Ins. Co.*, (Mass.) 41 N. E. Rep. 658; 16 Am. & Eng. Enc. of Law, 2nd Ed. 942 b and cases cited.

TYSON, J.—Action on policy of fire insurance.

To the complaint the defendant interposed the plea of the general issue and a number of special pleas. Plea 8 to which a demurrer was sustained neither denies nor confesses and avoids the allegations of the complaint. The demurrer was properly sustained to it.

Plea 9 was also faulty in not setting out the terms of the policy sued on, so that the court could determine the right of defendant to cancel it and thereby terminate

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its liability thereon. Whether the cancellation asserted was in accordance with the terms of the policy was a question of law, and the court could not decide that question unless the terms of the policy under which defendant asserted its right of cancellation were set out in the plea. *Hardy v. Br. Bank*, 15 Ala. 727; *Mead v. Hughes*, Ib. 141.

Plea 10 was in substance and legal effect a plea of *non est factum* and was not sworn to. The complaint is in Code form and implies an action in the name of the assured mentioned in the policy issued to the plaintiff.—*Feibelman v. M. F. I. Co.*, 108 Ala. 180.

It appears from the averments of the fifteenth plea that by the terms and conditions of the policy the defendant reserved the right to cancel it upon giving the *assured* five days notice. It is also shown by the plea that the property insured was the property of the plaintiff, and that she was named in the policy as the assured, and it is not averred that notice of cancellation was given to her by defendant. On the contrary the notice was only given to Janette Mauchlin who was named as mortgagee to whom "loss was payable as her interest might appear." It does not appear what was the amount of her mortgage debt, if that were important, or that defendant had the right under the policy to give the notice to Mrs. Mauchlin as the representative of the assured, the plaintiff, or that she had the right to surrender it for cancellation without the consent or authority of plaintiff. For clearly the facts alleged cannot be construed that Mrs. Mauchlin was plaintiff's agent in respect to surrendering the policy or receiving the notice.

The fact that she had possession of the policy, we apprehend, did not confer upon her the right to surrender it for cancellation without the consent of plaintiff.

It is true the text in 16 Am. & Eng. Ency. Law (2nd ed.) p. 873, relied upon by appellant as sustaining the sufficiency of the plea lays down broadly the rule that "when by the terms of the policy the loss is made payable to a mortgagee of the insured premises, notice to such mortgagee of the cancellation of the policy is sufficient and it is also not necessary to notify the owner." The only authority cited to support this proposition is the case of *Meuller v. S. F. I. Co.*, 87 Pa. 309. An examination of

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that case discloses that it does not support the proposition. There the policy authorized the defendant to give the notice to the "assured or his representatives." The court held that under the policy the mortgagee was the "representative" of the assured and that defendant had the right to give the notice to him, which in no wise contravenes the principle universally recognized, that the right in the defendant to cancel the policy is strictly construed and the condition imposed upon it with respect to giving notice of cancellation must be strictly performed.—1 Biddle on Insu. 368; 1 May on Insu. 367, et seq; 16 Am. & Eng. Ency. Law (2nd ed.), p. 873; 2 Joyce on Insu. § 1660.

The 13 and 14 replications were amended so as to meet the demurrers interposed to each of them. After amendment they were not demurred to.

The 3rd plea sets up that plaintiff did not, before the commencement of the suit, give notice to the defendant in writing of the loss as required by a term of the policy; and the 4th, that plaintiff did not give immediate notice to defendant in writing of the loss as required by the policy. The provision of the policy with respect to notice, is in this language: "If a fire occur the insured shall give immediate notice of any loss thereby in writing to the company," etc.

The 16th replication to these pleas simply avers that defendant had actual notice of the loss within forty-eight hours after the fire. It will be observed that it is not averred how the actual notice was by the defendant acquired, whether by information given by the assured in writing or otherwise or by acquiring the information from a stranger or by an agent of the company visiting the "scene of the fire" or in some other way. Construing the replication most strongly against the pleader, as we must do, it cannot be held that the notice was acquired in the manner provided by the policy, but as ascertaining broadly that knowledge on the part of the defendant of the loss in whatever manner acquired, excused the giving of the written notice of the loss by the assured. It does not attempt to set up a waiver by defendant of the notice which the assured bound itself to give. The fact that the company knew of the loss did

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not excuse the giving of the notice within a reasonable time.—2 Ward on Fire Insu. p. 939; 1 Joyce on Insu. § 576. The replication was clearly insufficient and the demurrer interposed to it should have been sustained.

It is however insisted by appellee that the overruling of the demurrer was innocuous. This seems to be predicated upon the theory that the averments of the 13th and 14th replications, as amended, were, as a matter of law, undisputedly established by the evidence.

It is true the evidence does show that plaintiff's husband, acting as her agent gave verbal notice of the loss to the local agent of defendant who issued the policy, and that in a conversation between them on that occasion something was said by defendant's agent about the policy having been cancelled. But what was said was a matter of dispute between them on the trial. If the agent's version of that conversation be the true one, clearly neither of the replications can be said, as matter of law, to have been proven.—*Queen Insu. Co. v. Young*, 86 Ala. 431. Nor do we mean to here affirm that if plaintiff's husband's version be the correct one that the replications were proved. If his statement be taken as true, and as showing an unqualified denial of liability of the company on the part of the agent, whether this constituted a waiver by defendant of the notice required to be given depends upon the authority of the agent to bind it by his statement, which will be adverted to later on in this opinion.

It is not insisted that the other replications to these pleas to wit; 15, 17, 19 and 20 were proven beyond adverse inference. It follows, therefore, that it cannot be declared that the error complained of was not injurious to defendant, since it is impossible to affirm upon which of the issues of fact presented by the several replications, that the verdict of the jury was responsive to.

The 19th and 20th replications present substantially the same issue, viz; that defendant was not entitled to notice or proof of loss on account of its violation of section 2619 of the Code, by belonging to or being connected with a tariff rate making association. The objection urged against the sufficiency of these replications is that the statute is unconstitutional. The statute does not

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create an absolute liability on an unoffending insurance company, nor does it impose a penalty for making a defense in the courts. It deprives all persons and corporations alike engaged in the business of fire insurance from demanding certain proof to be made by the insured and imposes a penalty as a consequence of its violation. The manifest purpose of the statute was to prevent monopoly and to encourage competition. The evil thus intended to be remedied was one violative of public policy as defined by the common law. The statute only imposes a penalty on what was already offensive to public policy. It did not make that which was innocent an offense, but simply provided a punishment for doing that which was already prohibited. In other words, it is a legitimate exercise of the police power of the State.—1 Tiedeman on State & Federal Control of Persons and Property, § 105. Nor is it violative of the constitutional provision for singling out particular persons or corporations and discriminating against them. It applies alike, as said above, to all persons or corporations, domestic or foreign, engaged in the business of fire insurance.—*Youngblood v. B. T. & S. Co.*, 95 Ala. 521; *O. Insu. Co. v. Daggs*, 136 Mo. 382; S. C. 172 U. S. p. 557.

Nor is it of consequence that the defendant is a foreign corporation. The state has the power to prevent foreign corporations from making contracts within its borders altogether or to impose such terms as it may deem expedient, provided they do not conflict with the exclusive powers of congress.

That foreign insurance companies are not engaged in inter-state commerce is too well settled to admit of dispute.

As said by the Supreme Court of the United States in *Paul v. Virginia*, 8 Wall. 168: "The policies are simple contracts of indemnity against loss by fire, entered into between the corporation and the assured, for consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another

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and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration.

"Such contracts are not interstate transactions, though the parties may be domiciled in different states." The demurrer to the replication was properly overruled.

This disposes of all assignments of error insisted on relating to rulings on pleadings.

Many written charges refused to defendant are assigned as error, and several of these assignments are insisted upon. But we will not undertake to pass upon them in detail. Suffice it to say that under the evidence, it was a question for the jury to determine whether the Birmingham underwriters agency had authority to waive notice and proof of loss.—*Robinson v. Aetna Insu. Co.*, 128 Ala. 477.

That agency, it seems, had the authority, among other things, to cancel policies of insurance issued by it for defendant; from this, and other acts, done by the agency, not expressly conferred by the instrument appointing it as agent, and recognized by its principal as having authority to do, it was open to the jury to find that its agent had authority to deny the defendant's liability on account of the policy having been cancelled. And if it, through its president Smith, made a distinct denial of defendant's liability (a fact to be ascertained by the jury), because the policy had been cancelled, this would be a waiver of the notice and proof of loss as required of the assured by the policy.

Again, under the evidence whether the defendant was in any wise connected with a traffic rate making association, in violation of the statute, was also a question for the jury.

Reversed and remanded.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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State *ex rel.* Johnson *et al.* v. Mayor & City Council of Ensley.

Proceedings in the Nature of Quo Warranto.

- 1 *Quo warranto*; does not lie to prevent threatened exercise of a franchise unlawfully.—The statutory proceeding in the nature of *quo warranto*, as provided by chapter 94 of the Code of 1896, (p.966) does not lie to prevent the threatened usurpation of an office, or the threatened exercise of a franchise unlawfully.

APPEAL from the City Court of Birmingham.

Heard before the Hon. CHARLES W. FERGUSON.

The proceedings in this case were instituted by the filing of an information of *quo warranto* by the State on the relation of M. M. Johnson and others, residents of the city of Ensley. It was averred in the petition that by an Act of Sept. 30th, 1903, (Local Acts 1903, p. 692), the corporate limits of the city of Ensley were extended so as to include the relators as citizens of said city. That embraced within this territory your relators and petitioners reside, some of them are engaged in the business of merchandising, and the others in various legitimate pursuits, commensurate with their means, abilities and tastes; that since the 1st day of January, 1904, and continually up to the time of the filing of this petition, the said city of Ensley, through F. G. Fonville, its city tax collector and treasurer, acting under the ordinances of said city, and through the instructions of its mayor and city council, has approached your relators and petitioners for the purpose of collecting a license or privilege tax for the year 1904, which said license or privilege tax had been levied for the current year 1904 upon the various businesses, callings and vocations carried on in said city of Ensley, by the inhabitants thereof, and in some of which your relators and petitioners were and are now engaged; but in the territory herein referred to by the last mentioned amendment to said charter;

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that said city of Ensley, through its treasurer and tax collector, and various policemen in its employ, who assume to act under and by authority of said ordinances of the city of Ensley, and who, within the corporate limits of Ensley, have the authority they assume to exercise over your relators and petitioners, have on divers times and occasions, since the 1st day of January, 1904, and up to the time of the filing of this petition, threatened your relators and petitioners with arrest, for the non-payment of the license and privilege tax alleged to have been imposed upon your relators by the said city of Ensley; through its mayor and city council, that demand has been made upon your relators and petitioners for the license and privilege tax alleged to have been so imposed, a copy of which ordinance, imposing tax alleged to have been so imposed, a copy of which ordinance, imposing the same is hereto attached marked "Exhibit C" and in so far as it is material hereto, is made part hereof, with leave to refer thereto as often as may be necessary; your relators and petitioners further show, allege and charge that all the aforesaid acts of the said city of Ensley, F. G. Fonville, as tax collector, and treasurer, and all the threats of the policemen of said city of Ensley, in reference to the things herein complained of, and the orders of the executive of said city of Ensley to enforce and compel payment of said license tax and privilege tax, in the territory referred to, are unlawful and without authority of law; that all said acts, doings, threats and intimidations, of your relators and petitioners and others, for the relief of whom this petition is, also, filed, by the persons, and each and all of them aforesaid, are mere usurpations, contrary to law and without authority; in direct violation of the rights, privileges and liberties of the public, the citizens of this State, and particularly those of your relators and petitioners; your relators and petitioners further show that unless this court intervenes by the proper order, the arrests, the threats, the intimidations and hardships incident and consequent thereto will be inflicted upon them."

It was then averred in the petition that this Act, approved Sept. 30th, 1903, was unconstitutional and void for many reasons assigned in the petition. Upon the peti-

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tion the relators prayed that the mayor and city council of Ensley be required to show by what law, warrant or authority they were proceeding to exercise the rights, privileges and franchises referred to in the petition; and further, that they show why a judgment should not be entered declaring that they were unlawfully exercising the franchises, and should therefore be perpetually enjoined from doing the threatened acts. The respondent moved to dismiss the petition upon the ground that the facts averred therein do not entitle the relators to the judgment prayed. Upon the submission of the cause upon this motion the court rendered a decree sustaining the same, and ordered the petition dismissed. From this decree the relators appeal and assign the rendition thereof as error.

W. J. MARTIN, for appellants.—The attempt of municipal corporations to exercise their franchises outside of their municipal boundary may be inquired into by information in the nature of *quo warranto*, or by injunction, and the remedies are cumulative.—Dillon on Municipal Corp., § 908; *East Dallas v. State*, 73 Tex., 370. *Quo warranto* to test the right of a legal municipality to exercise jurisdiction over certain territory, as in case of the attempted extension of the corporate limits, may be brought direct against the municipality.—23 A. & E. Ency. of L., (2d. ed.) 622; *The People v. Oakland*, 92 Cal. 611; *City of East Dallas v. State*, 73 Tex. 370; *The People v. Peoria*, 166 Ill. 370.

ROMAINE BOYD, *contra*.—"Quo warranto will not lie unless there is an actual wrongful possession and user by the respondent of the office or franchise in question. A mere claim of right is not enough."—Amer. & Eng. Enc. Law Vol. 23 p. 601 & cases cited. "Statutory *quo warranto* cannot be employed to test the legality of the official action of public officers."—High on Extraordinary Remedies §§——; *Leigh v. State*, 69 Ala. 266.

DOWDELL, J.—The proceeding by *quo warranto*, or on information in the nature of *quo warranto*, is regulated and provided for, in this state by our statutes.

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Chapter 94, page 966 of the Code of 1896, provides a system as to procedure and remedy, which supersedes and takes the place of the common law remedy.—*State ex rel Attorney-General v. Elliot*, 117 Ala. 172. The proceeding in this case must, therefore, be considered as instituted under the statute.

Municipal corporations are expressly excepted from the provisions of § 3417, Chap. 91 of the Code. The question then is, can the present proceeding be maintained under subdivision 1 of § 3420. Said section authorizes an action in the name of the state against any party offending in the cases mentioned in the three subdivisions thereunder. Subdivision 1 reads as follows: "When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state."

It is to be observed, that by the language employed, that, it is the actual usurpation, intrusion into, or unlawful holding or exercise of any public office or any franchise within the state, etc., that the statute is leveled against, and not a mere claim of office or threatened usurpation, or threatened exercise of a franchise unlawfully. Waiving consideration of the question as to whether a municipal corporation as such, may be proceeded against under said section, we will consider the averments of the information as to their sufficiency under the statute.

The incorporation of the city of Ensley, is admitted in the information filed by the relators; it is likewise shown by the averments thereof, that among the franchises or powers granted under the charter, is the power to levy taxes, and enact licenses or privilege tax. There is no pretense of any usurpation of or intrusion into office, or any unlawful holding of office, nor is it averred that there has been any unlawful exercise of any franchise. The most that can be said of the averments in the information, is, that an unlawful exercise is threatened of the franchise granted under the charter. And this charge is based upon the theory, that the amendatory act of the charter, of September 30th, 1903, extending the corporate limits of the municipality is unconstitutional and void.

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The relators are residents of the territory claimed to be brought within the corporate limits of the municipality by said amendatory act. If it be conceded that the said act is void, this would not help the relator's case, since the information only charges a *threatened* abuse of a franchise or grant under the charter, that may never be attempted to be carried out.

Our conclusion is, that the averments of the information are wholly insufficient under the statute to authorize the writ of *quo warranto*, and the court committed no reversible error in dismissing the information.

Affirmed.

McCLELLAN, C. J., HARALSON and DENSON, J. J., concurring.

Langley *et al.* v. Andrews.

Bill in Equity to Foreclose a Mortgage.

1. *Equity pleading; no reversible error to fail to pass upon a demurrer.*—Where a bill in equity is not subject to a demurrer interposed thereto, the fact that the chancellor omitted to rule upon said demurrer, notwithstanding it was embraced in the note of submission, constitutes no error prejudicial to the respondent.
2. *Equity pleading; when answer of one of defendants can be considered and read as evidence.*—As a general rule, the answer of one defendant is not good against another, but when the right of a complainant as against one defendant is only prevented from being complete by some question between the complainant and a second defendant, the answer of the second defendant may be considered and read in evidence.
3. *Bill to foreclose mortgage; when answer of the assignor of the mortgage will be considered and read in evidence against the mortgage.*—Where the assignee of a mortgage files a bill against both the mortgagor and assignor to foreclose said mortgage, and execution of the mortgage is proved, and the assignor by answer admits the assignment, the complainant will be entitled to a decree, notwithstanding the mortgagor may deny all knowledge of the assignment.

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4. *Execution of written instrument; what constitutes duress rendering instrument voidable.*—It is not the threat of a criminal prosecution in any case that constitutes duress which is deemed sufficient to avoid contracts, or to render invalid the execution of a written instrument, but the threat of criminal prosecution must be of such a nature and made under such circumstances as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the acts sought to be voided must be performed by said person while in such condition.
5. *Same; duress; ratification.*—A contract made under duress is only voidable and, therefore, the party upon whom duress has been imposed subsequently recognizes the validity of the contract involved, either by making payments thereon or otherwise, he will be held to have elected to waive the duress and ratify the contract.
6. *Mortgage; stipulation for payment of attorney's fee.*—The provision contained in a mortgage that the proceeds of the sale from the mortgage should be devoted, first, to the payment of the expenses of said sale, "including a reasonable attorney's fee for collecting said sum, whether by foreclosure of under order of sale, or by proceedings in court or otherwise," is sufficient to authorize the allowance of an attorney's fee for filing a bill in equity to foreclose said mortgage.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. RICHARD B. KELLEY.

The appeal in this case is prosecuted from a final decree granting the relief prayed for by the complainant. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

JAMES W. STROTHER, for appellant.—An attorney's fee cannot be allowed for a foreclosure in equity unless there is shown a necessity for resorting to that method.—*Bedell v. Mortgage Co.*, 91 Ala. 325; *Am. &c. Mortgage Co. v. McCall*, 96 Ala. 200. The defense of duress being fully made out, respondent Langley was entitled to a decree dismissing complainant's bill; a contract, the execution of which was induced by threats of criminal prosecution and imprisonment, is void; and it makes no difference whether the threats were of lawful or of unlawful imprisonment, this is equally true.—*Hartford Fire Ins. Co. v.*

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Kirkpatrick, Dunn & Co., 111 Ala. 456, and authorities therein cited.—*Morse v. Woodworth*, 155 Mass. 251, which is cited with approval and quoted from extensively in the above case is a very strong authority in support of the contention here made and fully supports the insistence of the appellant on this point.—See also *Brown v. Pierce*, 7 Wall. (U. S.) 215; *Fillman v. Ryan*, 168 Past. 484; *Heckman v. Swartz*, 64 Wis. 48; *Phelps v. Zuschlag*, 34 Tex. 371.

E. M. OLIVER, *contra*.—It is true that, as a rule, the answer of a defendant cannot be read as evidence against a co-defendant, but there are exceptions. In cases, however, where the right of the plaintiff as against one defendant, is only prevented from being complete by some question between the plaintiff and a second defendant, the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first.—1 Dan. Ch. Pr., 4 Ed. 842, Chap. 22, sec. 1; *McLane v. Riddle*, 19 Ala. 180; *Green v. Casey*, 70 Ala. 417. The evidence is not sufficient to avoid the mortgage on the ground of duress.—*Wildsmith v. Tracy*, 80 Ala. 258.

DENSON, J.—On the 16th day of June, 1904, W. T. Langley executed to one A. H. Slaughter, his note under seal in the sum of twenty-five hundred and seventy-nine and 68-100 dollars, due October 15th, 1894, and a mortgage on certain real estate to secure said note.

On the 14th day of September, 1904, the said note and mortgage were assigned by the mortgagee to S. M. Inman & Company. On the 9th day of September, 1895, S. M. Inman & Company, assigned the note and mortgage to J. E. Andrews, who as such assignee, on the 1st day of May, 1897, filed the bill in this case for the purpose of having said mortgage foreclosed. During the progress of the litigation, J. E. Andrews died, and the cause was revived in the name of Walter Andrews as the administrator of his estate.

W. T. Langley and A. H. Slaughter, the mortgagor and mortgagee, with Sandy Rowe, James Carpenter, Leonard Rainey, T. A. Hicks and W. T. Slaughter were made par-

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ties respondent to the bill, as originally filed, it being alleged in the bill that the five last named persons were in possession of the lands involved in the litigation; that their interest was unknown but was subordinate to the mortgage.

On a former appeal, it was held, that the assignment made of the mortgage to J. E. Andrews by S. M. Inman & Company, was not in requisite form to convey the legal title and, therefore, that they were necessary parties to the bill.—*Langley v. Andrews*, 132 Ala. 147. The bill was thereupon amended by making S. M. Inman & Company and the individuals composing the firm parties.

This amendment avers that S. M. Inman & Company, is a firm having its principal place of business in Atlanta, in the state of Georgia; that said firm is composed of S. M. Inman and W. H. Inman.

The respondent, Inmans and A. H. Slaughter answered the bill as last amended; in their answers they admitted all of the allegations of the bill and disclaimed any interest in the subject matter of the suit.

Decrees *pro-confesso* were entered against all of the other respondents except W. T. Langley, and he alone defends against the bill.

The defense made by Langley's answer as to the merits of the case are, that the note for the security of which the mortgage was given is wholly without consideration; that he was not indebted to the mortgagee in any sum; that the note and mortgage were executed by him under duress, and payment of the mortgage indebtedness.

In the answer of Langley is incorporated a demurrer to the bill as last amended, upon the ground that the amendment making S. M. Inman & Company parties, fails to show that S. M. Inman and W. H. Inman are the only members of the firm of S. M. Inman & Company, and that there is no prayer for relief against said parties.

The chancellor on final hearing rendered a final decree in which he ascertained the amount due on the note and mortgage and ordered a foreclosure of the mortgage.

In the final decree the chancellor omitted to rule upon the demurrer to the bill, notwithstanding it was embraced in the respondent Langley's note of submission.

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This omission in the decree is presented for review by the first and second assignments of error.

Upon an examination of the bill as last amended, we conclude that the averments therein fully answer the demurrer, and while it may have been a more orderly course of procedure for the chancellor to have made a specific ruling upon the demurrer, yet, the demurrer being without merit, there was no error prejudicial to respondent in the omission of the chancellor to pass upon the demurrer directly.

It is next contended by the respondent, appellant here, that the allegations of the amended bill were not sustained by proof, and that without such proof the final decree in favor of the complainant was erroneous. This contention, as shown by brief of counsel relates only to the averments as to S. M. Inman & Company's interest. We have shown above the amendment relating to this matter.

The record shows that S. M. Inman and W. H. Inman filed answers to the bill as amended in which they admitted all the allegations of the bill, and especially do they aver in their answers that they have no interest whatever in the lands conveyed by the mortgage to complainant.

"It is a general rule, with but few exceptions, that the answer of one defendant is not good against another. Yet when the right of a complainant as against one defendant is only prevented from being complete, by some question between the plaintiff and the second defendant, the answer of the second defendant may be read as evidence. Thus, if a mortgage is assigned, and the assignee files a bill against both the mortgagor and assignor, and the mortgage is proved and the assignor admits the assignment, the complainant will be entitled to a decree, notwithstanding the mortgagor may deny all knowledge of the assignment. The reason of this is, that the mortgagor has no interest in the assignment, and as the answer of the assignor estops him, the equity of the assignee is complete."—*McLane & Plowman v. Riddle & Burt*, 19 Ala. 180; *Green v. Casey*, 70 Ala. 417.

In the case of *Moore v. Hubbard*, 4 Ala. 187, which was a suit for the settlement of partnership accounts,

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partners who had sold their interest, were defendants to the bill, and they admitted the transfer by their answer. The court held that the answer could not be read as evidence of the transfer against the other defendants. The court commenting on this ruling in the case of *McLane & Plowman v. Riddle & Burt*, *supra*, said: "The error of this opinion consists in this, that the answer of the partners who had transferred their interest would bind them, and would always be evidence as between them and the complainant of the transfer, and they never could afterwards successfully assert their interest." So we conclude there is no merit in this contention of the appellant.

The sixth assignment of error is not insisted upon in the brief and argument of counsel and we will pass it.

This brings us to the consideration of the defense that the note and mortgage were given under duress: With respect to this defense, the respondent in the second paragraph of his answer makes the following averment; "Further answering said bill the respondent says, that he denies that on the 16th day of June, 1894, he was indebted to A. H. Slaughter. He admits that on said day he executed to said Slaughter a note and mortgage as described in said paragraph two of the bill, but he avers and alleges that said note and mortgage were obtained from him under duress by threats of criminal prosecution made to this respondent by one J. S. Akers, who was the agent of A. H. Slaughter and S. M. Inman & Company in said transaction, and he further avers that said note and mortgage to the said A. H. Slaughter were wholly and entirely without consideration because this respondent was not indebted to the said Slaughter in any manner, and he did not receive from the said Slaughter at the time of the execution of said note and mortgage, any money or anything else as the consideration for said note and mortgage; but this respondent avers and alleges that he was induced to sign said note and mortgage by said threats of prosecution."

Certainly these averments as to duress are of a very general nature and are mere conclusions of the pleader. The character of the threats, and of the criminal prosecution is nowhere disclosed in the pleading, and we must

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find it, if it existed, in the evidence adduced upon the subject.

"The general rule of law is well established, on reasons of justice and sound policy, that contracts, in order to be valid and binding, must be the result of the free assent of the parties. Therefore, duress, either of actual imprisonment or *per minas*, constitutes a good defense to an action on a contract in behalf of those from whom contracts have been thus extorted. Duress by menaces, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, including a reasonable fear of loss of liberty."—*Robinson v. Gould*, 11 Cush. 55. "It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in such condition."—*Wolff v. Bluhm*, 95 Wis. 257; S. C. 60 Am. St. Rep. 115; *Flanigan v. City of Minneapolis*, 36 Minn. 406.

In the case of *Hartford Ins. Co. v. Kirkpatrick*, 111 Ala. on page 467, discussing this subject, it was said by this court; "It cannot, of course, be said that the fact, that a payment or contract is made or induced from a mere fear of imprisonment, if it should not be made, affords any reason for avoiding the payment or contract on the ground of duress. But if the fact that the person making the same is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, it will amount to duress. The question in every case is whether his liability to imprisonment was used against him by way of threat to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they did overcome his will, he may avoid the settlement."—*Barrett v. Mahnken*, 6 Wyo. 541; S. C. Am. St. Rep. 953; *Rendleman v. Rendleman*, 156 Ill. 568; *Higgins v. Brown*, 78 Me. 473; *Shattuck v. Watson*, 7 L. R. A. 551 and notes thereto.

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The question of duress *per minas, vel non*, is one of fact in the particular case.—10 Am. & Eng. Ency. Law, (2nd ed.), p. 326. Conceding that Akers was the agent of the mortgagee Slaughter, and that the Slaughter mortgage was the one he had in mind, was speaking about and trying to procure from respondent at the time he made the threat attributed to him, yet, when the defense of duress is tested by the above principles of law, we cannot say that the chancellor's conclusion upon the evidence adduced in support of the defense is erroneous.

"In general, a contract made under duress is only voidable, and not void; hence the one on whom duress has been imposed may either repudiate or affirm it."—10 Am. & Eng. Ency. Law, (2nd ed.), page 334, and citation of authorities under note 1. It has also been held that if the party upon whom duress has been imposed recognizes the validity of the contract involved, either by making payments thereon or otherwise, he will be held to have elected to waive the duress and ratify the contract.—10 Am. & Eng. Ency. Law, (2nd ed.), page 337 and citation in note 1.

The record in this case shows that the complainant, J. E. Andrews was examined as a witness, and *inter alia*, he testified that W. T. Langley (the respondent), first informed him that S. M. Inman & Company held the note and mortgage against him and requested him to buy them.

As suggested in the brief of counsel for appellee, the first note of submission shows that this testimony of J. E. Andrews was taken prior to June 20th, 1898, and was published and open to the inspection of the respondent at that time, and by an order made March 1st, 1899, the chancellor set aside the submission and gave each party the right to take additional testimony and to re-examine any witness theretofore examined. The cause was not again submitted until December 7th, 1899, and the respondent has never denied nor sought to contradict this testimony of J. E. Andrews. We feel that we are fully warranted in presuming that the evidence is true and was so regarded by the respondent, or he would have contradicted it. If then, Andrews bought the note and mortgage at Langley's request, it would seem, that upon the

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plainest principles of equity jurisprudence, Langley, by his own conduct, effectually estopped himself from setting up the defense against them which he has attempted to set up in this suit.—*Wilkinson v. Searcy*, 74 Ala. 243; *Auerbach v. Pritchett*, 58 Ala. 451; 3 Mayfield's Digest, p. 422, § 264, p. 424 § 311 p. 425 § 346.

There is abundant evidence in the record tending to show consideration for the note and mortgage and also in refutation of the defense of payment.

It is insisted by the appellant that the chancellor erred in the amount decreed to be due to the complainant. We have computed the interest on the note according to its terms, from the date of its maturity to the date of the decree of foreclosure, and allowing the complainant ten per cent. attorney's fee on the amount of principle and interest due on the note, we have found no error prejudicial to the appellant.

But, it is insisted that under the terms of the mortgage the complainant is not entitled to an allowance for attorney's fees. This insistence is rested upon the proposition, that such fee cannot be allowed for a foreclosure in equity unless there is shown a necessity for resorting to that method. The cases of *Bedell v. Mortgage Co.*, 91 Ala. 325; *American Freehold Land Mortgage Company of London, Limited v. McCall*, 96 Ala. 200. are cited in support of appellant's insistence. In each of the cases cited the mortgage contained a power of sale in which was stipulated the payment of attorney's fees, "if it shall become necessary to employ an attorney to foreclose this mortgage, or collect any part of the debt therein secured." It was ruled, that a Solicitor's fee for filing a bill to foreclose could not be allowed unless a necessity was shown for resorting to that remedy; the correctness of the ruling cannot be denied.

The mortgage involved in this suit, however, does not contain the provision found in the mortgages involved in the cases above cited, but the provision with reference to allowance of attorney's fees is as follows, namely, "the proceeds of sale to be devoted, first, to the payment of expenses of said sale, advertising, etc., including a reasonable attorney's fee for collecting said sum, whether by foreclosure or under power of sale, or by proceedings

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in court or otherwise." Thus the case is withdrawn from the influence of the cases relied upon by appellant, and is controlled by the case of *Stephenson v. Allison*, 123 Ala. 439.

The note stipulates for ten per centum attorney's fee, and under the influence of the case last above cited, the chancellor in ascertaining the amount of the mortgage indebtedness was authorized to allow the attorney's fee of ten per centum.

We concur in the conclusions reached by the chancellor, and having discovered no error in the record the decree of the chancery court must be affirmed.

Affirmed.

McLELLAN, C. J., HARALSON and DENSON, J.J., concurring.

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Action for Injury to Mule.

1. *Damages; wantonness or wilfulness.*—In an action for damages charging defendant with wanton or wilful wrong, the question of wantonness or wilfulness *vel non* is properly left to the jury.
2. *Charge to jury; error to single out particular facts.*—It is error in a charge to the jury to give undue prominence to particular facts upon which the defendant hypothesizes a particular phase of his defense.
3. *Same; rate of speed; when question for jury.*—In an action against a street railway company to recover damages for injury to a mule, alleged in the complaint to have been caused by the wilful or wanton negligence of the defendant, where the evidence shows that the accident occurred at the intersection of two streets where the mule could not have been seen by the motorman until the car had reached the crossing, the question as to whether running the car at the rate of 5, 6 or 7 miles an hour at such place was wilful or wanton negligence, is a question for the jury.

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4. *Wilful or wanton injury; what constitutes.*—The rule of law as to wanton or wilful injury, is correctly set forth in the charge, "The court charges the jury that before a party can be said to be guilty of wilful, or wanton conduct, it must be shown that the person charged therewith was conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act, or omitted some known duty which produced the injury.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This action was tried on the 3d count of the complaint charging the defendant with wilfully or wantonly injuring a mule, the property of plaintiff, to which count the defendant interposed the plea of "not guilty." There was a verdict for the plaintiff.

The evidence showed that defendant was engaged in the business of operating an electric street railway in the city of Montgomery. That one of defendant's lines ran along Chandler street, and that the track was straight for several hundred yards on either side of the intersection of Chandler and Procter streets. That plaintiff's mule hitched with another mule was being driven in a walk along Procter street, and was struck at the intersection of Chandler street and Procter street by one of defendant's cars, and badly injured. The evidence for the plaintiff showed that the wagon to which the mule was hitched was loaded with sand; that no view of Chandler street could be had until the car track was reached on account of intervening buildings; that the mule was struck as it got upon the track and simultaneously with the driver's first sight of the car. The plaintiff introduced witnesses who testified that the car was going "very fast," "as fast as it could go," "about fifteen miles an hour." The defendant's witnesses testified that the car was going six or seven miles an hour. There was conflict in the testimony as to whether or not the motorman rang the bell on approaching the crossing. The motorman testified to applying brakes as soon as he saw the peril. The defendant asked and the court refused the following written charges: 1. "The court

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charges the jury that if they believe the evidence in this case they will find a verdict for the defendant." 2. "The court charges the jury that if they believe the evidence in this case, they should not find a verdict under the 3d count of this complaint." 3. "The court charges the jury that there is no evidence in this case of any wilful or wanton conduct on the part of the defendant, or its agents or servants, or employees in charge of the car, which collided with plaintiff's mule." 4. "The motorman had the right to assume, on approaching Procter street, that travellers on foot or in vehicles would look and listen for approaching cars before attempting to cross the track, and this fact you may look to in determining whether or not the motorman was guilty of wilful or wanton wrong." 5. "The court charges the jury that if you believe from the evidence that the car was not being run faster than five or six miles an hour, and that after the motorman discovered the peril of the mule he put on the brakes and tried to stop the car but was unable to do so before the injury happened, then there can be no recovery in this case." 6. "If you believe from the evidence that the car was being run at the rate of five or six miles an hour, then this would not warrant a verdict against the defendant for wilful or wanton wrong." 7. "The court charges the jury that before a party can be said to be guilty of wilful or wanton conduct, it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty which produced the injury." The defendant severally excepted to the refusal by the court of the foregoing charges, and the action of the court in this respect is assigned as error.

STEINER, CRUM & WEIL, for appellant.

HILL, HILL & WHITING, *contra*.

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ANDERSON, J.—The trial court charged out all of the counts of the complaint except number 3, which charges a willful or wanton act.

Under the evidence, although there was a conflict as to the rate of speed the car was going, and as to the motor-man's knowledge of the surroundings, the trial court properly left it to the jury to determine, whether or not defendant was guilty of a wanton or willful wrong. *M. & C. R. R. v. Martin*, 117 Ala. 367; *L. & N. R. R. Co. v. Webb*, 97 Ala. 314.

Charge 4 was properly refused. It singles out a fact upon which it is hypothesized, and seeks to direct special attention to the evidence, tending to show that phase of the defense, and give it undue prominence. We have heretofore observed, more than once, that charges of this character, assuming that the jury may look to this fact or may consider that fact, or are unauthorized to infer certain formulative conclusions from the evidence, and especially from specific parts of it, are bad.—*E. T. V. & G. R. R. v. Thompson*, 94 Ala. 636; *Snyder v. Burke*, 84 Ala. 53; *Hawes v. State*, 88 Ala. 37; *Salin v. State*, 89 Ala. 56.

Charges 5 and 6 are bad and were properly overruled. We cannot as a matter of law, say that the defendant was not guilty, if the car was not going faster than 5, 6 or 7 miles an hour at such a crossing as is described by the evidence. It was a question for the jury; besides the charges do not attempt to fix the speed of the car at the time of the injury. The car may have been running at the rate of 5. 6 or 7 miles an hour, during the day, yet may have been running much faster when the injury was inflicted.

The 8th charge has often received the condemnation of this court. It is argumentative and also calls upon the trial court, to declare to the jury, that there is no evidence of a particular fact.—*Jefferson v. State*, 110 Ala. 89.

Charges 7 asserts the law, and for its refusal, the judgment of the court must be reversed.—*L. & N. R. R. Co. v. Orr*, 121 Ala. 489; *M & C. R. R. v. Martin*, *supra*. Reversed and remanded.

MCCLELLAN, C. J., TYSON and SIMPSON, J.J., concurring.

[Hoffman v. Milner.]

Hoffman v. Milner.*Bill in Equity to Foreclose Mortgage.*

1. *Arrostration; conclusiveness of award; usury.*—Where the question of indebtedness between two parties is submitted by agreement of the parties to arbitrators and one of the stipulations of the submission was that legal interest should be computed upon the items of indebtedness found, from the dates of maturity, and in accordance with such submission an award is made by the arbitrators ascertaining the amount to be due from one of the parties, for which notes are given, which are secured by a mortgage, if upon default being made in the payment of the notes, a bill is filed to foreclose the mortgage, the plea filed by the debtor mortgagor to such bill, alleging that there were numerous items of usury included in the finding and award of the arbitrators presents no defense to the maintenance of such bill; the issue of usury *vel non* having become foreclosed and concluded by the award.

APPEAL from Chancery Court of Tallapoosa.

Heard before the Hon. RICHARD B. KELLY.

The bill in this case was filed by the appellant Walter Hoffman against the appellee, Elbert Milner. The purposes of the bill and the facts of the case necessary to an understanding of the decision are sufficiently stated in the opinion. The complainant excepted to the plea interposed by the defendant upon the ground that it was insufficient in that the amount alleged to be due was ascertained by the award of the arbitrators, and that the award was conclusive.

On the submission of the cause upon the exception to the sufficiency of the plea, the chancellor rendered a decree overruling the exceptions, and holding that the plea was sufficient. From this decree the complainant appeals and assigns the rendition thereof as error.

HOUSTON & POWER, T. L. BULGER and SOBRELL & SOBRELL, for appellant.—Cited *Lee v. Sims*, 65 Ala. 248-254; *Curry v. Davis*, 44 Ala. 281; *Carlisle et al. v. Barker*, 57

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Ala. 257; *Bell v. Laurence, Admr.*, 51 Ala. 160; *Adams v. McKenzie*, 18 Ala. 698; 8 Cyc. 530-h..

No counsel marked as appearing for appellee.

MCCLELLAN, C. J.—The bill and its exhibits show that Hoffman and Milner submitted the question of the latter's indebtedness to the former and the amount of it to arbitrators, and that one stipulation of the submission was that legal interest should be computed upon the items of indebtedness found, from the dates of maturity. It is further made to appear that the arbitrators executed the submission, and found that Milner was indebted to Hoffman in a sum certain. By the terms of the arbitration agreement Milner was to give his notes for the amount found due in five installments payable on a certain day each year for five years, and to secure these notes he was to execute a mortgage on certain lands. These notes and this mortgage were duly executed by Milner. Another stipulation of the agreement was that Hoffman was to pay the costs of a pending suit involving the amount of this indebtedness, and to pay Milner one hundred and forty-two dollars in money. Both these payments were seasonably made by Hoffman. Milner, on the other hand, paid the first of the notes falling due. Defaulting in the other payments, Hoffman filed this bill to foreclose the mortgage and collect the amounts evidenced by the four remaining notes. Milner interposed a plea of usury to the bill alleging that numerous items of usury charged on the several items of the original debt were taken into account by the arbitrators, and carried into their finding and constitute in part, or in whole the balance of indebtedness which they found and for which the notes and mortgage were given. We are of opinion this is a bad plea. The issue of usury *vel non* was foreclosed by the award. By the terms of the submission, usury was to be excluded from the finding. The right to adduce evidence to the elimination of usurious charges and claims was secured to Milner. He had the opportunity to exercise this right. If, with or without evidence upon his part, the arbitrators included such charges in their award, he had his remedy

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for the correction of this error by appeal under section 522 of the Code. No appeal having been taken, and the integrity of the award not having been assailed in any other direct proceeding, if there be any available, it must stand as a final ascertainment and declaration of the indebtedness upon the same footing and having the same qualities of conclusiveness against the defense of usury as a judgment of a competent court for the amount of the indebtedness: To an action on such judgment usury could not be pleaded, and by the same token it cannot be pleaded to this action on the award made by the arbitrators.—*Wilbourn v. Hurt*, (Ala.) 36 So. Rep. 768.

The chancellor erred in holding the plea sufficient. The decree must be reversed; and it will be here decreed that the plea is insufficient.

Reversed and rendered.

HARALSON, DOWDELL and DENSON, J.J., concurring.

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Action against Railroad Company to Recover Damages for Killing a Horse and Destroying Wagon and Harness.

1. *Evidence; when statement not the conclusion of witness.*—In an action against a railroad company to recover damages for alleged negligent killing of a horse, where the owner testifies that he visited the place of the accident and saw marks on the ground indicating the horse had been dragged, and this statement is, on motion of defendant, excluded, the further question propounded to the witness as to "How great a distance had this something been pushed or dragged along the track?" is not subject to the objection that it calls for the conclusion of the witness and for incompetent testimony.
2. *Contributory negligence; duty of person approaching track of railway.*—It is the duty of a person approaching the tracks of a railway for the purpose of crossing it, to stop and look, and if necessary, to listen for approaching trains; and where

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there is an omission of this duty, followed by injury resulting from a collision with a train or locomotive or car, while attempting to cross over the track, the person so injured and so failing to discharge the duty resting upon him is, as a matter of law, guilty of contributory negligence which precludes his recovery of damages in an action which counts upon the simple negligence of the railroad company or its employees.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WILLIAM S. ANDERSON.

This action was brought by the appellee, Charles E. Pearce, against the Louisville & Nashville Railroad Company.

The facts of the case are sufficiently stated in the opinion.

From a judgment in favor of the plaintiff, the defendant appeals and assigns as error the rulings of the court on the evidence, and among other rulings, the refusal of the court to give the general affirmative charge requested by the defendant.

GREGORY L. SMITH, for appellant.—“It is contributory negligence in crossing a railroad track, not to stop, or listen, for an approaching train.”—*Robinette v. Ala. Gr. So. R. R.*, 137 Ala. 501; *H. A. & B. R. R. Co. v. Maddox*, 100 Ala. 620; *Ga. Pac. Ry. v. Lee*, 92 Ala. 267; *R. R. Co. v. Crawford*, 89 Ala. 245; *Ga. Pac. v. O’Shields*, 90 Ala. 30; *R. R. Co. v. Black*, 89 Ala. 316; *Gothard v. R. R. Co.* 68 Ala. 119; *E. T. V. & G. v. Kornegay*, 92 Ala. 228; *Glass v. R. R.*, 94 Ala. 587; *R. R. Co. v. Sampson*, 91 Ala. 564; *Highland Ave. & Belt v. Maddox*, 100 Ala. 621; *R. R. v. Richards*, 100 Ala. 366; *Cen. of Georgia v. Forshoe*, 125 Ala. 213; *Cen. of Ga. v. Freeman*, 134 Ala. Ala. 354.

FITTS & STOUTZ, *contra*.—The question was not open to the objections made against it and the answer did not state a conclusion and was competent evidence. *B’ham Union Ry. Co. v. Alexander*, 93 Ala. top Page 137; *K. C. Memphis & B’ham. R. R. Co. v. Henson*, 132 Ala. 528. “This sort of evidence has been used with reference to all manner of object.”—1 Greenleaf on Evidence mid. Page 82, 16th Edition.

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The defendant was guilty of such negligence as entitled the plaintiff to recovery.—*A. G. S. R. R. Co. v. Boyd*, 124 Ala. 526 and authorities there cited; *Chat. So. R. R. Co. v. Daniel*, 122 Ala. 363; *Chat. So. R. R. Co. v. Wilson*, 124 Ala. 444.

HARALSON, J.—The plaintiff sues to recover two hundred dollars, the value of a horse, wagon and harness, which were alleged to have been negligently run over and destroyed by a train of cars of defendant company in the city of Mobile, averring that the killing of his horse and the destruction of his wagon and harness were the result of negligence on the part of the railroad company, its servants or agents.

The defendant pleaded the general issue, and a special plea, in substance, that the person in charge of plaintiff's horse and wagon, was driving, south, upon the defendant's track, and negligently failed to leave said track in time to avoid being stricken by the defendant's train which was approaching in a northerly direction, although said driver could, by the exercise of reasonable diligence, have known of the approach of said train in time to leave said track, before the injuries complained of, and that said negligence proximately contributed to the said injuries.

According to the evidence of the plaintiff, the accident occurred in the evening, when it was dark; that the person in control of the horse and wagon was driving upon the west side of Commerce street in Mobile, and came to a place at the corner of Commerce and St. Francis streets, blocked by a big hole about ten feet in diameter, which had a red light on it; that there was a string of cars standing on the east side of the street and some drays on its west side, and the only showing, as the driver testified, to get around the hole, was to drive on the track just east of the hole; that he had driven about twenty feet on the track, when about ten cars backed from the north, coming, as it appeared, about twenty miles an hour, ran on his team; that he drove upon the railroad track and started down south, without thinking about the train. He stated, that "A man only looks

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at his horse when he is driving, and that he looked up just in time to save himself; * * * * that he had just headed his horse, south, and the box car bumped the horse in the face; * * * * that when he looked up, it was too late; that he had driven but a short distance on the track before he was caught." He also stated that he saw a light before the car struck the wagon that there was a man on the car with a lantern in his hand, and as it seemed, two or three cars from the end, who was moving towards him hallowing at the same time, and if he had not hallowed witness would have been killed.

The switchman of the train testified, that he was on the car at the time of the accident; that the train was going north with six cars which were being pushed ahead of the engine, at the intersection of Commerce and St. Francis streets; that the driver was driving south on the west side of Commerce street and tried to drive across just in front of the cars; that he could not get out of the way and jumped off the wagon and ran off leaving his wagon; that the witness was on top of the first car at the north end, and another switchman was also on the car; that it was dark and the car was only about two lengths from the wagon at the time the driver drove upon the track, and the train was traveling at six miles an hour; that as soon as witness saw the driver start across the track, he began flagging the train to stop, and whistled to the driver before he got on the track, and the driver said he heard somebody whistling, but did not know where it came from; that the engineer put on the brakes and reversed the engine, and the train moved about two car lengths after witness began flagging; that the cars were about 34 feet long, and the bell was ringing all the time, and every thing was done to avoid the accident, that could have been done.

The owner of the horse testified that he went to the place of the accident, shortly after it occurred. He was asked by the plaintiff, to describe the condition of the ground along the track. He replied, that, "on St. Francis street, at the end of the box car, * * * there was wreckage of the harness and some pieces of wheel, and some parts of wagon, and the mare was dragged. I

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could see from the marks on the ground where she had been dragged, from the intersection of St. Francis street." On motion of defendant, the court excluded "that portion of the answer in which the defendant had stated that the mare had been dragged. Thereupon, the plaintiff asked the witness the following question: "How great a distance had this something been pushed or dragged along the track in the street?" The defendant objected to the question, because it called for the conclusion of the witness, and as calling for incompetent testimony, but the court allowed it against its objection.

After the portion of the answer, in which the witness had stated that the mare had been dragged, was stricken, there was nothing of the answer remaining except, that there was wreckage of the harness and some pieces of the wagon and wheels on the ground, and nothing about any thing having been dragged. The question that followed, assumed that something had been dragged, but it was not objected to on this ground. The objection was that "it called for a conclusion," and was incompetent. If something had been dragged, it was not a conclusion of the witness in so stating, but was a fact to which he was competent to testify and it was competent to be so stated, as tending to show the circumstances of the collision and how rapidly the car was running at the time of the collision.—*Watkins v. State*, 89 Ala. 82.

The defendant insists that the general charge requested by it should have been given. This contention proceeds upon the undisputed fact, that the plaintiff's servant drove upon defendant's track without first stopping, looking and listening for the approach of the train. In so doing, there can be no question but that he was guilty of negligence.—*G. P. R. R. Co. v. Lee*, 92 Ala. 267; *C. of G. R. R. Co. v. Freeman*, 134 Ala. 354; *Ib. v. Foshce*, 125 Ala. 199.

There was evidence that if plaintiff's driver had used this precaution, he could have seen the approaching train just ahead of him and the accident would not have occurred. The driver himself testified that one driving only looks at his horse, and that he looked up just in time to save himself; that he was not thinking about the

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train at that moment, until his attention was called to it by the man on the train hallowing to him, and was looking right down on the track, and when he got on the track, the car was very near to him. There was no evidence that defendant's servants were negligent in not seeing the peril of the wagon and horse sooner, or after such discovery. That such negligence on the part of the driver contributed proximately to the collision cannot be doubted.

"The logical rule in this connection, the rule of common sense and human experience, as well, * * * * * is that a person guilty of negligence, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."—*Armstrong v. Montgomery Street Railway Co.*, 123 Ala. 233.

The plea of not guilty and contributory negligence were interposed to the complaint, upon which issue was joined. Under this double defense, that of contributory negligence of the plaintiff, was not in whole nor to any extent an admission that defendant had been guilty of any negligence. In such a state of pleading the case may be tried upon either or both lines of the defense set up, and if either is made out the defendant is entitled to a judgment. "The plaintiff, to make out his side of the case, must prove the defendant was guilty of negligence, the proximate effect of which was to injure him. This will entitle him to recover unless it showed the plaintiff was also guilty of negligence, which contributed proximately to the injury."—*Carter v. Chambers*, 79 Ala. 229; *McDoneld v. M. S. R. R. Co.*, 110 Ala. 162.

If the case rested upon the plea of not guilty, under the evidence, the question of defendant's negligence would be one proper for the determination of the jury. But as we have said, the evidence bearing on the defense of contributory negligence of plaintiff's servant, is not in conflict, is clear and certain, leaving no room for doubt, in which case, it was a question of law for the

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court to decide. The general charge for the defendant should have been given.—*Mouton v. L. & N. R. R. Co.*, 128 Ala. 547.

In the view we take of the case, it is unnecessary to pass on the other assignments of error.

Reversed and remanded.

MCCLELLAN, C. J., DOWDELL and DENSON, J.J., concurring.

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Action of Assumpsit.

1. *Trial and its incidents; when the introduction of evidence discretionary with the court.*—In the trial of an action of assumpsit when the plaintiff has made out a *prima facie* case, after the defendant has introduced his testimony, and after the plaintiff has closed his testimony in rebuttal, as to whether the defendant will be permitted to introduce other testimony which was not in rebuttal of plaintiff's testimony, is in the discretion of the trial court, and is not revisable.
2. *Action of assumpsit; when plaintiff entitled to recover for services of wife.*—In an action brought by plaintiff to recover an amount alleged to be due for services as a teacher—where defendant sets up the fact that plaintiff during part of the time alleged to have been covered by such services, was sick and the evidence tended to show that during such time the wife of plaintiff taught for him, and it is open to the jury to find that the defendant accepted the services of the wife in lieu of the plaintiff, it is error for the court to instruct the jury that they could not find for the plaintiff for services rendered by his wife.
3. *Same; same.*—In such an action where one of the items of the account sued on was the salary earned by plaintiff's wife, and the plaintiff testified that the salary earned by his wife during such time belonged to him, the creditability of such evidence was a question for the jury, and it would be error to instruct the jury that the plaintiff could not recover anything for the salary promised to be paid his wife.

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APPEAL from Tallapoosa Circuit Court.

Tried before the Hon. N. D. DENSON.

This was an action of assumpsit brought by appellee, F. O. Hellier against the Southern Industrial Institute to recover an amount due appellee from the defendant for services rendered as a teacher in said institute. The defendant pleaded the general issue, and by way of special pleas set up the defense that it was not indebted to the plaintiff in the manner and form as alleged; that it had paid the debt; that while plaintiff was employed as teacher in the defendant's school he lost considerable time from said school, and that the value of the time so lost was offered as a set-off, or in recoupment of the amount claimed by plaintiff.

On the trial of the cause plaintiff introduced testimony tending to show that he had rendered services as a teacher to the defendant under a contract of employment, and that he had not been paid the full amount due him, and that the amount claimed in this suit was a balance due. The defendant introduced testimony tending to show that while plaintiff was in its employ as a teacher, by reason of sickness, lost considerable time. In rebuttal the plaintiff introduced testimony showing that during the time he was sick his wife, Mrs. Hellier, taught for him and in his stead; and that during the time she taught for him she was not employed by the defendant as a teacher. There was testimony introduced that Mrs. Hellier had, during part of the time of plaintiff's employment, been employed as a teacher in said school.

The other facts are sufficiently stated in the opinion.

Upon the introduction of all the evidence the defendant requested the court to give to the jury the following written charges, and duly excepted to its refusal to give said charges as requested:—(1.) "The court charges the jury that if they believe the evidence in this case, they cannot find for the plaintiff for any amount on account of services rendered by Mrs. Hellier during the fall of 1901." (2.) "The court charges the jury that the plaintiff cannot recover anything for the salary of Mrs. Hellier during the time she was employed as a teacher by the defendant." (3.) "If the jury believe

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that plaintiff's account has been paid down to less than one hundred dollars, and if they further find that he lost one month's time out of the school during the fall of 1901, while the school was in session, then the plaintiff cannot recover and your verdict will be for the defendant."

There was a verdict and judgment for the plaintiff. The defendant made a motion for a new trial on the ground that the verdict was contrary to the evidence, because same was contrary to law, and because the verdict was excessive. The court overruled the motion for a new trial, and the defendant duly and legally excepted. The defendant appeals and assigns as error the rulings of the court below.

JAS. W. STROTHER, for appellant.

THOS. L. BULGER, *contra*.

TYSON, J.—The trial court, it appears, excluded the testimony of the witness Langley because not in rebuttal, but was part of the defendant's original case. In this there was no error. The evidence sought to be elicited from this witness was for the purpose of showing that defendant was entitled to certain credit upon the account sued upon. In other words, to show a payment upon the account by defendant under its plea of payment. After the plaintiff made out a *prima facie* case, which he did by testifying that the account introduced in evidence was correct, the burden was upon the defendant to establish his plea of payment, and this it ought to have done before plaintiff offered his evidence in rebuttal. Whether he should have been permitted to do so after plaintiff had closed his testimony in rebuttal, was within the discretion of the trial court and not revisable.

There was evidence that Mrs. Hellier, during the fall of 1901, while plaintiff was sick, taught for him and in his stead; that she was not employed by defendant during that period as a teacher. It was open to the jury to find that defendant accepted her services in lieu of her

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husband's, the plaintiff, and that he was to receive the compensation for those services under his contract of employment, just as though he had rendered them himself. Charge 1 was, therefore, properly refused.

The plaintiff testified that the salary earned by Mrs. Hellier as teacher during the session 1900-01, which is comprised in one of the items of the account sued on, belonged to him. The credibility of this testimony was for the determination of the jury and not for the court.

Charge 2, requested by defendant, was therefore improper.

Charge 3 refused to defendant is not intelligible. And, indeed, cannot be made so without a change in its phraseology, which, of course, we are not authorized to do. Charges must be given or refused in the terms in which they are written.—§ 3328 of Code.

We are unwilling to affirm that the court should have granted the motion for a new trial.

Affirmed.

MCCLELLAN, C. J., SIMPSON and ANDERSON, J.J., concurring.

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Habeas Corpus Proceedings.

1. *Constitutional law; repeal of dispensary act as to Coffee County and prohibiting the sale of liquors in said county.*—A notice that application will be made to the Legislature "for the repeal of the law authorizing the establishment of dispensaries, so far as the said law relates to the county of Coffee, and forbids the commissioner's court of the county of Coffee from erecting dispensaries for said county," or a notice that application will be made to repeal "an act to authorize the municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate and prohibit the sale of said liquor, approved Feb. 18th, 1899, in so far as the same applies to the county of Coffee," does not set forth the substance of the act approved Sept. 25th, 1903, entitled "An act to repeal an act entitled an act to author-

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ize municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate or prohibit the sale of such liquors, approved on the 18th day of Feb. 1899, in so far as said act relates to the county of Coffee, and to prohibit the sale or giving away of such liquors in the county of Coffee, after the first Monday in January, 1904." (Local Acts, 1903, p. 316); and said last named act being a local act, is unconstitutional and void, as being offensive to Section 106 of the Constitution.

2. *Same; act establishing dispensaries in the town of Elba unconstitutional.*—The act approved Oct. 1st, 1903, entitled "An act to establish and regulate a dispensary in the town of Elba, Coffee County, Alabama, for the sale of spirituous, vinous and malt liquors, and to establish and perpetuate board of commissioners for the management of said dispensary." (Local Acts, 1903, p. 443), is unconstitutional and void, in that by its terms said act grants an exclusive right to the commissioners provided for therein as individuals, and their successors, to establish and maintain a dispensary, and thereby traffic in liquor, etc., in the town of Elba, and is therefore in violation of the organic law prohibiting monopolies.

APPEAL from the order of the Probate Judge of Coffee County.

Heard before the Hon. F. M. RUSHING.

The facts in this case are sufficiently stated in the opinion.

RILEY & WILKERSON, for appellant.

R. H. ARRINGTON and W. L. MARTIN, *contra*.

Appeal from decision and order of Judge of Probate of Coffee County on *Habeas Corpus* proceedings, discharging petitioner.

DOWDELL, J.—The appellee was tried and convicted by the mayor of the town of Elba on the affidavit and warrant for the violation of a town ordinance. The proceedings before the mayor appear to have been regular, and while yet in the custody of the marshal under the judgment of conviction, and on the same day the judgment of conviction was rendered, and while the fine and

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costs remained unpaid, the petitioner sued out a writ of *habeas corpus* before the probate judge of the county, and was on the hearing by the judgment of said probate judge discharged from such custody, and from this judgment the town of Elba appeals.—Code 1896 § 4314; *Burr v. Foster*, 132 Ala. 41.

The main question presented for consideration involves the constitutionality *vel non*, of the two Acts of the Legislature, one approved Sept. 25th 1903, Local Acts, 1903, p. 316; the other one approved October 1st, 1903, Local Acts 1903, p. 443.

The title of the Act of September 25th, 1903, is "An Act, to repeal an Act entitled an Act to authorize municipal and other subdivisions of the state, to buy and sell spirituous, vinous and malt liquors, and to further regulate or prohibit the sale of such liquors, approved on the 18th day of February, A. D., 1899, in so far as said Act relates to the county of Coffee and to prohibit the sale or giving away of said liquors in the county of Coffee after the first Monday in January, A. D., 1904." The Act itself under this title is composed of five sections. The first section provides for the repeal of the former statute as to Coffee county as set out in the title. The second section provides for prohibition in said county after the first of January, 1904. The third section provides a punishment for the violation of the provisions of the Act. The fourth section makes it the duty of the judge of the circuit court to give the Act specially in charge to the grand jury at each term of the court. The fifth sections contains the general repealing clause.

The Act, being a local one, it was necessary to its validity that notice and proof of notice should be made as required by § 106 of the Constitution. This section provides as follows: Sec. 106, "No special, private or local law shall be passed on any subject not enumerated in Section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the State, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive

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weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each House of the Legislature, and said proof spread upon the Journal. The courts shall pronounce void every special, private or local law which the Journals do not affirmatively show was passed in accordance with the provisions of this section."

The notice of this law which was exhibited with proof of the notice to the Senate and House, as shown on page 1918 printed Vol. of Senate Journal 1903, and on page 1301 House printed Journal, was in two forms, and as follows, omitting the affidavit, we copy the two notices as they appear on the Journal: "Notice." "To all whom this may concern, greeting:" "Notice is hereby given that application will be made at the present session of the Legislature of the State of Alabama for the repeal of the law authorizing the establishment of dispensaries so far as the said law relates to the county of Coffee in said State, and to forbid the commissioners court of the county of Coffee from erecting dispensaries for said county." Signed "A. Pelham, H. H. Blackmon."

"Notice."

"Notice is hereby given that at the next session of the Legislature in September, 1903, application will be made to repeal "An Act to authorize municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate and prohibit the sale of said liquors, approved February 18th, 1899, in so far as the same applies to the county of Coffee. Said "appeal" to take effect on the first Monday in January, 1904."

Under the principle laid down in the case of *Wallace v. Board of Revenue*, 37 So. Rep. 323, where section 106 of the constitution was construed, and where it was decided what was meant by the terms *substance of the pro-*

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posed law as they occur in that section, it requires no argument to show, that in neither of the notices copied above, is the substance of the proposed law as it passed the Legislature, stated. Under the authority of the case above cited, the said Act of September 25th, 1903, must be declared void, as offensive to section 106 of the Constitution. We do not consider the other objections raised to this statute.

This brings us to the consideration of the question of the constitutionality of the Act of October 1st, 1903, and entitled "An Act, to establish, maintain and regulate a dispensary in the town of Elba, Coffee county, Alabama, for the sale of spirituous, vinous and malt liquors, and to establish and perpetuate a board of commissioners for the management of said dispensary."

When we compare this Act with the Florence Dispensary Act, which was so ably and exhaustively treated in the case of *Mitchell v. State*, 134 Ala. 392, we find in reality and in principle nothing to distinguish the two Acts to the end of withdrawing the Act before us from an application of the doctrine laid down in *Mitchell v. State*. There is this difference in the two Acts: In the Act under consideration, the commissioners were not in express terms constituted a corporation. We think that it can make no difference that the commissioners were not declared to be a body corporate. Whether they be constituted a corporation, or are mere private persons having the powers, or some of the powers and incidents of a corporation, what difference can there be in principle when we come to apply the doctrine of the *Mitchell case, supra*. It seems it would have made no difference in that case, whether the commissioners were private persons, or were constituted a corporation.

Another difference between the two Acts is, that the Florence Act, in terms, authorized the commissioners, at any time they might see proper to do so, to suspend or discontinue the dispensary, while no such express authorization is contained in the Act before us. The title of the Act here is "To establish, maintain and regulate a dispensary in the town of Elba, etc., and to establish and perpetuate a board of commissioners for the management of said dispensary." The Act itself appoints

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the individuals constituting the board of commissioners and fixes their respective terms of office, and further provides for the election of their successors by the court of county commissioners. There is no other governmental means or aid provided whereby to perpetuate the existence of the dispensary for the purposes for which it is created. The dispensary is created with a board of commissioners to manage and control it, without a dollar to inaugurate its business being furnished, or authorized to be furnished, from any governmental source. The board of commissioners, it is true, are authorized to contract and be contracted with, sue and be sued, and to borrow money on the credit of the dispensary.

Without any capital to start the business, or a dollar's worth of property on which to base a credit, its start in the business for which it was created is dependant solely upon means to be furnished by individuals, and its success dependent upon individual efforts prompted largely if not solely, by incentives attributable to selfish ends, and not to duties imposed by law. There is nothing in the act to prevent a suspension or a discontinuance of the business by a failure on the part of those to whom its management and control is committed, and nothing in the law requiring its inauguration, and nothing requiring the exercise of any privilege conferred, as that of borrowing on the credit of the dispensary, if necessary, at any time to keep the concern going. It would seem from this, that although the Act does not in express terms authorize the commissioners to suspend or discontinue at pleasure, it leaves it where suspension or discontinuance may follow from non-action on the part of the commissioners.

Moreover, it may be asked, what is there to prevent a levy and sale under execution by a creditor of the liquors in stock at any time, a thing that could not be done, if such liquors were the property of the state, county or town?

The fact that the Act says that the commissioners' court of the county shall have "care and guidance" of the said dispensary, does not make it the dispensary of the county. The Act creates a dispensary, and appoints

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a board of managers, or commissioners, whose duties are to superintend and supervise, and to have, in fact, the "care and guidance" of its affairs, these commissioners having the exclusive right to appoint the dispenser, also, the right to remove him and appoint another, the duty of said manager or dispenser being to keep on hand at all times a stock of liquors, etc., under the direction of said dispensary commissioners, and to sell for cash and turn the money over to the secretary of board, who is also selected by the said dispensary commissioners, and who is not required to be a member of said board. And yet in the Act is inserted the language above quoted, viz; "that the dispensary shall be under the care and guidance of the county commissioners," an empty prerogative when we look to the Act to find the active, positive duties of the court of county commissioners. No way is indicated in which this "care and guidance" is to be exercised. The court has the authority by itself only, to remove a dispensary commissioner, and that must be for cause. They, the court of county commissioners, have no express authority in the conduct of the dispensary itself. There is another right conferred by the Act on the county commissioners, but it is at the same time conferred in the disjunctive on the board of dispensary commissioners, the language of the act is as follows; "The dispenser shall be of good moral character and sober habits and shall have charge and control under the supervision of said Board of Commissioners, or said Court of County Commissioners." This language is at variance with section 1 of the Act giving the court of county commissioners "care and guidance" of the dispensary. It serves to show the emptiness of the general terms—"care and guidance," as used in section 1, and further that it was but a futile attempt to meet the objections to the Florence Dispensary Act held invalid in *Mitchell v. State, supra*.

The dispensary is neither the property of the state, county or town of Elba. It is not managed or controlled by either of these governmental agencies, nor, as for that matter, by any governmental agency. The provision in the Act that the court of county commissioners shall have the "guidance and care" of the concern, when taken

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in connection with the provisions of the Act which place the management and control absolutely in the hands of others, robs the former provision as to "care and guidance" of the court of county commissioners of any meaning; at least, takes away from the said court any positive power of control and direction. Neither the state, county, or town of Elba is to furnish the capital to run the concern. The applications of any profits that may arise from the venture is similar to the provisions in the Florence Dispensary Act as to the application of the profits.

What was said in *Mitchell's case*, *supra*, is apposite here; "it is obvious that an act proceeding on the general lines upon which this one proceeds might amount to an arbitrary designation by the legislature, or by the commissioner's court of a county * * * of private persons or a private corporation to carry on the liquor traffic to the exclusion of all other private persons and private corporations in palpable violation of fundamental law. For illustration: Suppose it were a fact that the net profits of the liquor business in Florence and East Florence were ten thousand dollars, and this act had provided a salary of two thousand dollars for each of these five commissioners, would any court hesitate to declare that such a statute would be the conferring of a special privilege on these men or this close corporation composed of them, that it would be invidious and class legislation and unconstitutional and void? Would not such a statute be clearly for the benefit of these individuals, exclusive of the equal right of other individuals to engage in this business? We do not know what the profits of these dispensaries are. They may, for aught we know to the contrary, not exceed the three hundred and fifty dollars to be paid to these commissioners. And can it make any difference what these commissioners are to receive out of the business when they in fact are to receive all its issues and profits, when they, and not the State, nor the county nor the city, inaugurate it and supply the funds for prosecuting it, and themselves, to the exclusion of all others equally entitled to engage in the traffic under organic guarantees, carry it on and re-

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ceive the proceeds of it? Can the legislature, indeed, thus provide for the farming out of this traffic to persons named by itself or to be named by the county and town authorities upon conditions involving merely the payment of some part of the proceeds to the county and town, and forbid other persons to engage in the traffic at all?"

From a careful consideration and analysis of the Act in question, in all of its provisions, and summing up the whole situation, it can be regarded as nothing more nor less than the grant of an exclusive right to the commissioners as individuals, and their successors, to traffic in liquor, etc., in the town of Elba, and therefore, offensive to organic law prohibiting monopolies.

In the case of *State ex rel v. Rushing*, following other decisions, it was decided that the charter of the town of Elba, Local Acts, 1898-9, p. 1201, did not of its own force repeal or annul the prohibition Act of 1896, Acts, 1896-7, p. 79, but that it was only when the municipality adopted an ordinance under its charter licensing whiskey that this took place. It is shown that the town of Elba had adopted a valid ordinance licensing liquors. This was done under its charter power contained in the Act of incorporation.—Local Acts, 1898-9, page 1201.

The petitioner was tried and convicted for a violation of a valid ordinance of the town of Elba, and he was in lawful custody at the time of the suing out of his petition and of his discharge by the probate judge. Under our view of the case, it therefore follows that the judgment discharging the petitioner must be reversed, and a judgment will be here rendered remanding the petitioner to the custody of the marshal of the town of Elba.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DENSON, J.J., concurring.

[Brannon v. Henry.]

Brannan v. Henry.*Statutory Action of Ejectment.*

1. *Color of title; may be shown by void deed; exception.*—While as a general rule, a void deed is admissible in evidence to show color of title to the person claiming thereunder, if, however, the deed offered is void because of the uncertain and indefinite description of the land conveyed, such a deed would not convey color of title, and possession under it would be limited to *possessio pedis*.
2. *Deed; description of lands conveyed; latent ambiguity.*—Where the description of lands in a deed is by Government numbers, but the township and range are not described as being south or north, or east or west, and in the county where the land is described as being situated there are townships north and south bearing the same number as that designated in the deed in which there is the same section as that designated in the deed, such description standing alone would constitute a patent ambiguity, which could not be relieved by parol testimony of what was intended by the parties to be conveyed; but where in such deed there is a recital that the lands described therein were sold for the payment of taxes that were due from one M. D. M., the owner of said lands, such recital makes the description set forth in the deed a latent ambiguity and authorizes resort to competent parol evidence in aid of the description set forth in the deed.
3. *Ejectment; admissibility of evidence.*—In an action of ejectment, where the defendant sets up the defense of adverse possession of 10 years, it is competent for the defendant as a witness in his own behalf to testify that he purchased the lands described in the complaint from the State and paid a certain sum of money therefor, and that he immediately went into possession of such lands, and has remained in possession thereof ever since said purchase.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WILLIAM S. ANDERSON.

This was a statutory action of detinue brought by the appellee, Mary Henry, against the appellant, Lewis L. Brannan, to recover certain lands specifically described in the complaint.

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The facts in the case are sufficiently stated in the opinion. Upon the introduction of all the evidence the court at the request of the plaintiff gave the general affirmative charge in her favor, to the giving of which charge the defendant duly excepted.

There were verdict and judgment for the plaintiff. The defendant appeals and assigns as error the several rulings of the trial court to which exceptions were reserved.

MCINTOSH & RICH, for appellant.—A tax deed, void as a muniment of title, may answer as color of title.—*Hughes v. Anderson*, 79 Ala. 209; *Mayfield's Digest*, Vol. 2, p. 82, §§ 134, 137, 138 and 147; *Stovall v. Fowler*, 72 Ala. 77; *McInerney v. Irvin*, 90 Ala. p. 275.

It has been decided in this State as far back almost as the organization of this Court that in ejectment cases, identity of the premises may be proved by parol.—*Bullock v. Malone*, (Minor), page 400.

The failure to state in the deed whether the township was north or south was, at most, but latent ambiguity, and the authorities expressly hold, that ambiguities of this character may be explained by parol.—*Chambers v. Ringstaff*, 69 Ala. p. 140; 1 *Greenleaf's Evidence*, page, 352, § 297; *Bullock v. Malone*, *supra*; *Brown on Parol Evidence*, page 305, § 98 et seq.; *Moody v. A. G. S. R. R. Co.*, 124 Ala. p. 195; *Stamphill v. Pulley*, 121 Ala. 250.

ERVIN & MCALEER, *contra*.—A patent ambiguity cannot be explained by parol proof of what the parties intended.—*Vann v. Lunsford*, 91 Ala. 580. And for the stronger reason when description of property is wholly uncertain proof cannot be made of what was intended. *Kennedy State & C. Co. v. Sloss-Sheffield Steel & I Co.*, 34 So. Rep. p. 373. A tax deed must give a certain description of the land conveyed.—*Blackwell on Tax Titles*, p. 379. Where the description of property, however, is ambiguous, identification must be established by the proof of facts, opinion or conjecture of what was intended will not do.—*Bernstein v. Humes*, 71 Ala. 269.

DENSON, J.—This is an action of statutory ejectment. While other lands were described in the complaint, by

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the proceedings had in the court below, and the judgment redereed there in favor of the plaintiff, the questions presented for consideration by this appeal, relate only to that part of the land described in the complaint, as the N. E. 1-4 of section 36, township 2 south, of Range 4 west, situated in Mobile county, Alabama.

The plaintiff offered in evidence a patent to the lands above described issued by the State of Alabama to Thos. Henry on the 2nd day of January, 1872, and then offered in evidence a certified copy of the last will and testament of Thomas Henry, deceased, devising the lands to plaintiff, together with the certificate of the judge of probate of Mobile county, showing the probate and record of said will. The foregoing was all of the plaintiff's evidence.

The defense attempted by the defendant was ten years adverse possession.

The defendant offered in evidence what purported to be a tax deed made to defendant by Cyrus D. Hogue, Auditor, on the 3d day of April, 1890, the lands contained in said deed are described as follows, to-wit: N. E. 1-4 of section 36, township 2, Range 4, lying and being situate in Mobile county, Alabama. The deed was offered merely for the purpose of showing color of title. The objection made by plaintiff to the deed was based on the ground that the deed was absolutely void and not self proving. The court sustained the objection and the defendant duly excepted to the ruling of the court. It must be conceded that the tax deed offered in evidence is not effective as a muniment of title, nor was it depended upon by the defendant as such.

The insistence of the appellant is, that a deed may be void and yet be admissible in evidence to show color of title. This insistence is amply supported by authority, and many of the deeds which have been held by this court to operate as color of title were void tax deeds. *Stocall v. Fowler*, 72 Ala. 77; *Childress v. Calloway*, 76 Ala. 128; *Hughs v. Anderson*, 79 Ala. 209; *Florence Land Co. v. Warren*, 91 Ala. 533; *Gist v. Beaumont*, 104 Ala. 347; *Zundel v. Baldwin*, 114 Ala. 328; *Reddick, et al. v. Long*, 124 Ala. 260; *Dorlan v. Westervitch*, 37 So. Rep. 382.

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The above rule it seems, is subject to this qualification, that if the deed offered is void because of the uncertain and indefinite description of the land conveyed, such a deed would not convey color of title, and possession under it would be limited to "*possessio pedis*." This exception is supported by reason and authority.—*Black v. Tennessee Coal, Iron & Railroad Co.*, 93 Ala. 109; *L. & N. R. R. Co. v. Boykin*, 76 Ala. 566.

It has been observed that the only objections made to the deed were, that it was absolutely void and that it was not self-proving. Where a paper writing is offered to show color of title it is not necessary that its execution should be proved.—*Gist v. Beaumont*, 104 Ala., 347 *Ala. State Land Co. v. Kyle*, 99 Ala. 474.

It may be true that, if at the time the deed was offered, there had been an objection that there was not at the time the deed was offered, any proof of actual possession under the deed, the court should have sustained it, but no such objection appears to have been made.

Is the deed void because of uncertainty and indefiniteness in the description of the lands, so as to bring it within the qualification above stated to the rule bearing upon the admissibility of a void tax deed as color of title? The appellee contends that it is, and that there can, for this reason, be no proper application of the rule, *id certum est quod certum reddi potest*. "This contention raises the question of patent ambiguity, which the authorities say can neither be explained nor made certain by parol proof." In the case of *Chambers v. Ringstaff*, 69 Ala. 140, Judge Stone, discussing the question said: "The distinction between latent and patent ambiguity has long existed, and the general rule applicable to each class of cases should not be disturbed. When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, things etc., that is patent ambiguity, or ambiguity apparent. In such cases, the rule is clear, and we do not wish to depart from it, that parol proof of what was intended by the contracting parties will not be received. Latent ambiguity exists, when, on the face of the paper, no doubt or uncertainty exists, but by proof *aliunde*, the language is shown to be alike applicable to two or more

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persons, things, etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up, by the same character of proof as that by which it is made to appear." The conveyance which the learned judge had under construction in that case, described the land only by section, township and range. It called for parts of sections 7 and 17, in township 12, range 18, nothing being said of the State, county, land district or Government survey in which the lands were situated. With reference to the description, in further discussion of the ambiguity, Judge Stone said: "Now, we judicially know but there is but one tract of land in Alabama which corresponds with this description. There is but one range 18 in the State, and that lies east of the basis meridian of St. Stephens. There is but one township 12 that bisects range 18, and that is north of the base of the survey." Under the above facts and statement of law, it was held permissible to adduce proof that the grantors at the time the conveyance was executed, owned and resided on lands in Montgomery county, Alabama, known by the same numbers as those employed in the conveyance.

We judicially know that there is no range 4 east in Mobile county, and we judicially know that there is a township 2 north, and a township 2 south, in that county, and that there is a section 36 in each of said townships. The deed we have for construction, in the description of the lands by the government survey designates with equal clearness, the two tracts of land, and if this were all, the ambiguity might be patent and parol evidence would not be admissible to aid the description. But we find in the deed offered in evidence, this recital, to-wit: "That, whereas, on the 17th day of May, A. D., 1881, and for three successive weeks thereafter, advertisement was made for the sale of the lands hereinafter described and conveyed, for the payment of the State and county taxes then due from M. D. Mann, the owner, of said lands." We do not judicially know which tract M. D. Mann owned, and we are clear in our conclusion that this reference to the lands in the deed would authorize a resort to competent parol evidence to aid the description

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set forth in the deed, and that the deed is not within the qualification referred to.—*Black v. Pratt, Coal & Coke Co.*, 85 Ala. 504; *DeJarnett v. McDaniel*, 93 Ala. 215; *Black v. Tennessee Coal, Iron & R. R. Co.*, 93 Ala. 109; *Webb v. Elyton Land Co.*, 105 Ala. 471; *Dorlan v. Westervitch*, 37 So. Rep. 382.

It follows that the court erred in sustaining the objections made to the deed, offered as it was, to show color of title merely.

After the defendant as a witness in his own behalf had without objection, testified that he purchased the land described in the complaint from the State and paid \$80.00 therefor, and that he immediately went into possession of it, and had been in possession of it ever since, the plaintiff moved to exclude this testimony because the deed under which he claims to have purchased, is void and shows on its face that it does not describe any land whatever. The court granted the motion and the defendant excepted. In this ruling we think the court erred. It will be noted that the only deed which had been offered by defendant, was on objection of the plaintiff not allowed in evidence, therefore, at the time the motion was made, there was no evidence that defendant was claiming under a deed, void or otherwise. Hence the specific ground of the motion was without foundation, and for this reason should have been overruled. But we think the evidence was not objectionable. It was certainly competent for the defendant to show that he went into possession of the land, and the evidence that he bought it and paid for it was relevant as tending to show the nature and character of the possession, and his claim, whether under *bona fide* claim of purchase.—*Barron v. Barron*, 122 Ala. 194.

It was not competent for the defendant when testifying to look at the deed and say whether the land described in the deed was in township 2 south, or township 2 north, and whether it was in range 4 east or west. The description in the deed might have been aided by proof tending to show that M. D. Mann once owned the lands or that he was in possession of them and that he was in possession of the lands in township 2 south if such proof was obtainable, and that the tax proceedings were had

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against him with reference to this land. This would be showing the circumstances and situation of the parties and land, and would give to the jury and court something shedding light upon the parties at the time the deed was made, so that their intention might be arrived at. The court did not err in sustaining plaintiff's objection to this question asked defendant by his counsel, to-wit: "I will ask you how much land did you buy in section 36?" If not objectionable otherwise, it assumes that defendant bought lands in section 36. The defendant claiming as an adverse holder, it is important that he should show that he entered upon the land under a *bona fide* claim of purchase to exempt him from filing the notice required by Code, 1896, § 1541. The statute has no application to a party who enters under a *bona fide* claim of purchase.—*Doe ex. dem. Holt v. Adams, et al.* 121 Ala. 664; *Sledge et al v. Singley, et al.* 139 Ala. 346.

The defendant should, under the rule above declared, have been permitted to show that he purchased the land and paid for it and that he was claiming under the purchase. This does not mean that the deed would have been admissible in evidence without proof *aliunde* aiding the description.

The 7th ground in the assignment of error, presents for consideration the propriety of the court's action in giving the affirmative charge for the plaintiff, but as the judgment must be reversed for errors pointed out above, we deem it unnecessary to consider this assignment.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON and DOWDELL, J. J., concurring.

[Rasco et al. v. Jefferson.]

Rasco et al. v. Jefferson.*Action for Breach of Constable's Bond.*

1. *Pleading and practice; statute of limitations.*—While as a general rule, if issue is joined on an immaterial plea, and its averments are proved, the defendant is entitled to the general affirmative charge, still if the defendant pleads that the cause of action is barred by the statute of limitations for one year, upon which plea issue is joined, and the cause of action is not such as is barred in one year, the defendant is not entitled to the general affirmative charge, although the suit was not brought until more than a year after the cause of action arose.—(*Nashville, Chattanooga & St. Louis Ry. Co. v. Parker*, 123 Ala. 633, overruled.)
2. *Action upon constable's bond; sufficiency of complaint.*—In an action to recover damages for the breach of a constable's bond where the complainant avers a breach of the bond by levying on and selling personal property which was not the property of the defendant in execution, but belonged to the plaintiff, and for which breach the plaintiff claims a certain named amount as damages, such complaint states a substantial cause of action, although it may fail to particularize the property so levied upon; such defect being the subject of demurrer.
3. *Evidence; ownership of personal property may be testified to.* The ownership of personal property is a fact to which a witness may testify.
4. *Action upon constable's bond; admissibility of evidence.*—In an action brought by a married woman to recover damages for the breach of a constable's bond, by reason of the constable levying an execution upon her property as the property of her husband, who was the defendant in execution, a statement made by the plaintiff at the time of the levy upon such property that she told the constable to look at her 12 babies, is incompetent, and should be excluded upon objection.
5. *Trial and its incident; remarks of attorney.*—In an action to recover damages for the breach of a constable's bond, in that the constable levied an execution upon property of the plaintiff, who was a married woman, as the property of her husband, who was the defendant in execution, where there was some evidence introduced tending to show that the husband

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of the plaintiff had made the statement that the property levied upon was his, the attorney for the plaintiff in his argument to the jury does not transcend the limits of legitimate argument when he says to the jury that he will leave it to them to say "whether or not it is not the custom for a man to speak of his wife's property as his property?"

6. *Action for breach of bond; sufficiency of plea.*—In an action against a constable and the sureties on his official bond, to recover damages for the breach of said bond, in that the constable levied an execution issued upon a judgment against another party upon the property of the plaintiff, where in the complaint it is averred that before the levy of said execution, the plaintiff notified the constable that said property belonged to her, a plea is insufficient and subject to demurrer which avers that on one or more occasions the plaintiff had stated to the constable that the property afterwards levied on by him was the property of the defendant in execution, and that therefore she was estopped to deny said execution; since such plea does not aver that said statements were made after the levy of the execution.

APPEAL from the Circuit Court of Hale.

Tried before the Hon. JOHN MOORE.

This action was brought by the appellee, Catherine Jefferson, against the appellants, W. P. Rasco and the sureties on his official bond, and sought to recover for the breach of said bond by reason of the defendant, W. P. Rasco, levying an execution issued upon a judgment recovered against the plaintiff's husband, Bab Jefferson, upon property belonging to the plaintiff.

The complaint as filed contained two counts. The first count sought to recover \$300 damages for the breach of the official bond to said W. P. Rasco, and set out said bond *in haec verba*, and then averred that the bond was breached by reason of the defendants Rasco as constable levying an execution issued on a judgment issued against Bab Jefferson upon personal property belonging to the plaintiff, without setting out, or in any way describing the property so levied upon. The second count was substantially the same as the first count, with the exception that it did not set out the bond at length. In each of the counts it was averred that the defendant Rasco levied the execution upon the property involved in

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the controversy after being notified by the plaintiff that it was not the property of the defendant in execution, but was the property of the plaintiff.

The defendants pleaded the general issue, and "that the cause of action is barred by the statute of limitations of one year;" and two special pleas designated B. and C. In plea B the defendant averred that the plaintiff on one or more occasions stated to the defendant Rasco that the property afterwards levied upon by him as such constable was the property of the said defendant in execution, and that therefore the plaintiff was estopped to allege that the property so levied upon by said Rasco as constable and sold under the execution was her property. To this plea the plaintiff demurred upon the ground that said plea shows on its face that the statements alleged to have been made by the plaintiff were made before the levy of the execution, and because the plea fails to aver that the said Rasco was not notified by the plaintiff before the sale that the property was the property of the plaintiff. This demurrer was sustained, and the plea was amended so as to aver that such statements were made by the plaintiff after the levy of the execution upon the property in question.

To this plea as amended, the plaintiff filed a replication, in which she averred that after having made the statements set up in said plea that the property could be sold, she notified said Rasco not to sell said property, and appeared at the sale and forbade said sale. Issue was joined upon replication to this plea, and also upon the plea of the general issue, and the plea of the statute of limitations.

On the trial of the case, it was shown that upon a judgment recovered in justice of the peace court against the husband of the plaintiff, execution was issued and put in the hands of the defendant Rasco as constable; that he levied said execution upon certain cows. The evidence for the plaintiff tended to show that the cows levied upon were her property, while the defendant introduced evidence tending to show that the defendant in execution had stated on several occasions that the cows levied upon belonged to him.

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During the examination of the plaintiff as a witness she testified that she told the defendant Rasco that the property which he levied upon and subsequently sold was hers, and not to take said property; she then testified that "I told him to look at by twelve babies." The defendant moved to exclude this statement upon the ground that it called for irrelevant, immaterial and incompetent evidence. The court overruled the motion and the defendants duly excepted.

The defendant as a witness in his own behalf, testified that he levied the execution upon the property in controversy, and he was then asked by the defendants the following question: "Whose property was that?" The plaintiff objected to this question upon the ground that the ownership of the property was to be determined by the jury, and the question called for the conclusion of the witness. The court sustained the objection, and to this ruling the defendant duly excepted.

During the arguments of the plaintiff's attorney to the jury, he used the following language: "I leave it for you to say, gentlemen of the jury, whether or not it is not the custom for a man to speak of his wife's property as his property?" The defendants objected to this statement, and moved the court to exclude the same upon the ground that it was illegal argument, and that there was no evidence of such a custom. The court overruled the objection and motion, and to this ruling the defendants duly excepted.

Upon the introduction of all the evidence, the defendants requested the court to give, among others, the general affirmative charge in their behalf, and duly excepted to the court's refusal to give the same as asked.

THOMAS E. KNIGHT, for appellants.—That the court erred in refusing to give the general affirmative charge requested in writing by the defendants is too plain to need argument, or citation of authority, to support the proposition. Both charges 1 and 2 directed a verdict for the defendants, if the jury believed all the evidence. Plea No. 2 setting up the defense of the statute of limitations of one year constituted one of the defenses in this case.

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Whether this plea presented a material, or immaterial, sufficient or insufficient, false or true, issue, is now of no moment. Parties may elect to try their causes on any issues that may suit their fancy. The evidence without conflict established the fact that the cause of action arose more than twelve months before the institution of the suit. The plea was proved without conflict. The court should have so instructed the jury, having been requested to charge the jury that if they believe the evidence they must find a verdict for the defendants.—*McGhee v. Reynolds*, 117 Ala. 413; *Taylor v. Smith*, 104 Ala. 537; *Breitling v. Meyer*, 123 Ala. 222, (on this point *Breitling's* case is not overruled.) *Wilke v. Johnson Laboratories*, 132 Ala. 268; *Williams v. McKissack*, 125 Ala. 544; *Bomer v. Rosser*, 123 Ala. 641; *Glass v. Meyer Son & Co.*, 124 Ala. 332; *Mudge v. Treat*, 57 Ala. 1.

DEGRAFFENREID & EVINS, *contra*.

ANDERSON, J.—The defendants requested, in writing, the general affirmative charge, which was refused, and the refusal of which is here assigned as error. The record discloses the filing of four pleas by defendants, the second plea being the statute of limitation of one year, and the plaintiff took issue thereon.

The proof shows that the cows were sold not later than December, 1899, and that the suit was not brought until March 15th, 1901, more than a year after that date.

The court has often held that when issue is joined on an immaterial plea and its averments are proved, the defendant is entitled to the general charge.—*McGhee & Fisk v. Reynolds*, 117 Ala. 413; *Taylor v. Smith*, 104 Ala. 538; *Lewis v. Simon & Co.*, 101 Ala. 546.

We hold, however, that the plea in this case was not proven. It is as follows: "That the cause of action is barred by the statute of limitation of one year," and is substantially in the Code form. As a matter of law, this action cannot be barred in one year, hence this plea must fall, although the suit was not brought until more than a year after the cause of action arose. Overruling *Nashville, Chattanooga & St. Louis Ry. v. Parker*, 123 Ala. 683.

[*Rasco et al. v. Jefferson.*]

Counsel for appellants contends that the complaint in this case is insufficient to support any kind of a judgment. We cannot agree with him in his contention. The complaint avers a breach of the bond by levying on and selling personal property, which makes out a cause of action when coupled with the claim of \$300.00 as damages. If the complaint fails to particularize the property or is otherwise vague and indefinite, the defect should be raised by demurrer, as it is only a complaint that fails to set out a cause of action, that can be reached by the general affirmative charge, not one that is vague and indefinite.

The defendant should have been permitted to ask witness Rasco, "Whose property was that?" Ownership of personal property is a fact to which a witness may testify.—*Steiner Bros. & Co. v. Tramm*, 98 Ala. 315; *Daffron v. Crump*, 69 Ala. 77; *Nelson v. Iverson*, 24 Ala. 9.

The court erred in not excluding the testimony of the plaintiff, "I told him to look at my twelve babies." It was not material to the issue before the jury and was highly prejudicial to the defendants, as it was calculated to arouse the sympathy of the jury in favor of the plaintiff.

The trial court did not err in refusing to exclude remarks of plaintiff's counsel, or in sustaining the demurrer to the defendant's plea.

Reversed and remanded.

MCCLELLAN, C. J., HARALSON, TYSON, DOWDELL, SIMPSON and DENSON, J.J., concurring.

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ACTION.

1. *Action upon a judgment; sufficiency of complaint.*—In an action upon a judgment, the complaint is sufficient if it sets forth the court by which the judgment was rendered, the place at which the court was held, the names of the parties, plaintiff and defendant, the date of its rendition, and the amount recovered; and it is not necessary in such a complaint to allege any particular reason for bringing the action upon the judgment theretofore recovered, other than that it was unpaid.—*Kaufman v. Richardson*, 430.
2. *Action upon a judgment; can be maintained within a year and a day.*—An action can be maintained upon a judgment within a year and a day from its rendition, which is before the expiration of the time after the rendition of the judgment within which an execution could be issued thereto to enforce it.—*Ib.* 430.
3. *Assignment of choses in action; suit may be brought in name of assignee.* The equitable title of an assignee to chose in action will be recognized by courts of law, and suit may be brought in the name of the assignor.—*Snead v. Bell*, 449.

AGENCY.

1. *Action of trespass; when principal liable for acts of agent.*—In an action of trespass to recover damages for the wrongful taking of mules, where it is shown that the defendant was at the time of the taking a sheriff, and that one of his deputies, according to his directions, went with an officer of the United States Army, to which the mules belonged, to locate the mules, and there was further evidence tending to show that said deputy assisted said army officer in taking the mules from the plaintiff, a charge which instructs the jury that if said deputy acted as the agent and under the instructions of the defendant in taking said mules, and said taking was wrongful, then the defendant would be guilty of a wrongful taking, asserts a correct proposition of law, and is properly given at the request of the plaintiff.—*Fulgham v. Carter*, 227.
2. *Principal and agent; contract in name of principal.*—If a contract which is made with an agent discloses his principal and it appears on the face of the paper that the contract is really made on behalf of the principal, although it is signed by the agent as agent, such contract is one for the principal and not by the agent in his own behalf.—*Bronson v. Russell*, 360.
3. *Agency; when notice to agent not notice to principal.*—When information is given to an agent upon a casual occasion, when no act or transaction of the agency is pending, and the occasion has no reference to the principal or to his business, such information to the agent is not notice to the plaintiff of the existence of the fact about which it is given.—*Patterson v. Irvin*, 401.
4. *Agency; what facts sufficient to authorize the inference of agency.*—Proof that an alleged agent sold merchandise and that thereafter without any communication between the purchaser and the alleged principal the merchandise was shipped by the alleged principal to the purchaser, while not sufficient

AGENCY—*Continued.*

to justify a witness in testifying as a matter of fact that the alleged agent was the agent of the principal, is sufficient to permit the inference by a court or jury that the alleged agent was the agent of the alleged principal and was acting as such in the transaction, and therefore in a suit to recover for deceit practiced in the sale of said merchandise it is error to exclude the representations of such agent made to the purchaser as to the quality of the merchandise so sold.—*Romano v. Brooks*, 514.

5. *Authority of agent to waive written notice provided for in policy; when such authority question of fact for the jury.* Where the local agent of an insurance company performs acts at various times not expressly conferred by the instrument appointing it as agent and such acts were recognized by the principal as within the authority of the agent and were not repudiated by it, it is a question of fact for the jury to determine whether or not the agent had authority to waive for defendant company a provision in the policy requiring written notice of loss to be given immediately after a fire occurred.—*Cont. Ins. Co. v. Parks*, 650.

ALTERATION OF INSTRUMENTS.

1. *Action upon promissory note; material alteration avoids contract; evidence.*—An alteration which makes a promissory note speak a language different in legal effect from that which it originally spoke, is material, and when made by one not a stranger to the paper, is sufficient to avoid the contract as to all parties not consenting thereto; and in an action upon such note, under issues properly presented, evidence tending to show such material alteration is admissible.—*Carroll v. Warren*, 397.

AMBIGUITIES.

1. *Deed; description of lands conveyed; latent ambiguity.*—Where the description of lands in a deed is by Government numbers, but the township and range are not described as being south or north, or east or west, and in the county where the land is described as being situated there are townships north and south bearing the same number as that designated in the deed in which there is the same section as that designated in the deed, such description standing alone would constitute a patent ambiguity, which could not be relieved by parol testimony of what was intended by the parties to be conveyed; but where in such deed there is a recital that the lands described therein were sold for the payment of taxes that were due from one M. D. M., the owner of said lands, such recital makes the description set forth in the deed a latent ambiguity and authorizes resort to competent parol evidence in aid of the description set forth in the deed.—*Brannon v. Henry*, 698.

APPEALS.

1. *Bill of exceptions; when properly stricken from the file.*—Where it appears from the record in a case that the bill of exceptions was not signed within the time prescribed by law, or within the time fixed by order of the court, such bill of exceptions will not be considered on appeal, and will be stricken from the file on motion; and where by order of the court the defendant in a criminal case is given "until January 5th, 1905," in which to have the bill of exceptions signed by the presiding judge,

APPEALS.—*Continued.*

- the time for signing the bill of exceptions expires on the night of January 4th, and if the time is extended on the 5th of January, it is after the expiration of the time allowed by order of the court.—*Richardson v. State*, 12.
2. *Judgment of conviction; void when rendered on day court not authorized to sit.*—The judgment of conviction in a criminal case which is rendered upon a day when the court is not legally in session, and at a term when the court is not authorized to sit, is void, and an appeal from such judgment will be dismissed.—*Walker v. State*, 32.
 3. *Appeal from void judgment; should be dismissed.*—Judgment rendered by a court which is held at a time and place unauthorized by law, is void and appeal therefrom will be dismissed.—*White v. State*, 42.
 4. *Construction of act creating city court of Gadsden; rule of practice on appeal; trial by court without jury.*—Under the statute creating and establishing the city court of Gadsden (Acts 1900-01, p. 1298), providing that where a cause is tried by the court without a jury "either party may, by bill of exceptions, also present for review the conclusions and judgment of the court on the evidence," etc., the appellate court can not review the correctness of the conclusion and judgment of the court upon the evidence, unless it is disclosed in the bill of exceptions that an exception was reserved thereto.—*Fleming v. State*, 52.
 5. *Trial and its incidents; general request for charges by defendant; how reviewed on appeal.*—The recital in bill of exceptions that the defendant "asked the court to give the following charges in writing, to-wit:" followed by four charges numbered consecutively, does not show that the court was separately requested to give each of said charges; and the court cannot be put in error for refusing to give said charges unless there was error in refusing all of them.—*Yeats v. State*, 58.
 6. *Appeal does not lie from decree overruling a motion to dismiss cross-bill.*—An appeal does not lie to the Supreme Court from a decree of a chancellor overruling a motion to dismiss a cross-bill for the want of equity therein; the statute authorizing an appeal from an interlocutory decree overruling a motion to dismiss a bill for the want of equity, (Code § 427) having application solely to a bill in equity, and not a cross-bill.—*McGaugh v. Holliday*, 185.
 7. *Trial and its incidents; refusal to give charge when not reviewed.*—Where the only recital in a bill of exceptions relative to the refusal of the court to give a charge requested, is "The defendant, in writing, requested the general charge for the defendant, but the court refused to give the same, to which action of the court refusing to give the general charge in favor of the defendant, he duly excepted," and the charge referred to is not set forth in the bill of exceptions, the Supreme Court will not review the rulings of the trial court in refusing said charge.—*Lunsford v. Bailey & Howard*, 319.
 8. *Appeal; motion to strike pleading must be shown by bill of exceptions.*—Where a complaint is stricken from the file on motion by the defendant, in order for ruling to be reviewed on appeal, it is necessary that the motion and the ruling thereon and the exception thereto, should be shown by a bill of exceptions.—*Henry v. N. C. & St. L. Ry.*, 336.
 9. *Appeal; when taken from decree dismissing bill.*—Where a cause in a chancery court is submitted for a decree upon a motion to dismiss for the want of equity, and upon demurrers, and

APPEALS—Continued.

- the chancellor renders a decree sustaining the motion to dismiss the bill for the want of equity, and orders that the bill be dismissed out of court, such decree is a final decree, from which an appeal may be prosecuted any time within a year from its rendition.—*Schwarz, R. & Co. v. Bailey*, 439.
10. *Appeal does not lie from refusal of court to vacate an order appointing a receiver.*—An appeal does not lie from the refusal of the court to vacate an order appointing a receiver; such order being merely interlocutory, and not being one from which under the statute an appeal can be taken.—*Gillett v. Higgins*, 444.
 11. *Rulings on motion to quash should be shown by bill of exception on appeal.*—The rulings of the trial court on motion to quash a writ of attachment, service, etc., will not be reviewed on appeal unless such rulings are presented by a bill of exceptions.—*Seaboard Air Line v. Hubbard*, 546.
 12. *Pleading and practice; how assignment of error upon pleadings considered on appeal.*—When an assignment of error, based upon the rulings of a trial court, upon demurrers to two separate pleas, is a joint and single assignment, it is unavailing to work a reversal of the judgment, unless there was error in the ruling upon the demurrer to each of the pleas.—*Ib.* 546.
 13. *Pleading and practice; variance cannot be raised first time on appeal.*—A question of variance between the allegations of a complaint and the testimony introduced at the trial of a case cannot be raised for the first time on appeal.—*Ensley Merc. Co. v. Otwell*, 575.
 14. *Appeal; from decree on demurrer must be prosecuted within 30 days.*—If an appeal from a decree upon a demurrer to a bill in equity is taken after the expiration of 30 days from the rendition thereof, the Supreme Court is without jurisdiction to entertain such appeal, and the same will be dismissed.—*Dennis v. Currie*, 637.

ARBITRATION.

1. *Arbitration; conclusiveness of award; usury.*—Where the question of indebtedness between two parties is submitted by agreement of the parties to arbitrators and one of the stipulations of the submission was that legal interest should be computed upon the items of indebtedness found, from the dates of maturity, and in accordance with such submission an award is made by the arbitrators ascertaining the amount to be due from one of the parties, for which notes are given, which are secured by a mortgage, if upon default being made in the payment of the notes, a bill is filed to foreclose the mortgage, the plea filed by the debtor mortgagor to such bill, alleging that there were numerous items of usury included in the finding and award of the arbitrators presents no defense to the maintenance of such bill; the issue of usury *vel non* having become foreclosed and concluded by the award.—*Hoffman v. Miller*, 678.

ASSIGNMENTS.

1. *Mortgage; assignment thereof; title does not revert by erasure of assignment.*—Where a mortgage is assigned by the mortgagee endorsing the assignment on the back of such mortgage, which assignment is duly acknowledged before a notary, and subsequently the assignee redeivered the mortgage to the mortgagee, and erased from the assignment endorsed thereon,

ASSIGNMENT.—Continued.

- the name of the assignee, such erasure and delivery of the mortgage does not have the effect to reinvest the title in the mortgagee, but the title remained where the assignment had placed it.—*Carter v. Smith*, 414.
2. *Assignment of choses in action; suit may be brought in name of assignee.* The equitable title of an assignee to chose in action will be recognized by courts of law and suit may be brought in the name of the assignor.—*Snead v. Bell*, 449.
 3. *Assignment of verbal contract; if not for payment of money, need not be prosecuted in name of party really interested; Sec. 28 Code.*—When an assigned contract or agreement to sell an amount of cotton at a stipulated price, the breach of which is relied upon for a recovery, is not for the payment of money, either express or implied, it is not governed by section 28 of the Code, which requires the action, where such is the case, to be prosecuted in the name of the party really interested. *Ib.*—449.
 4. *Same; when contract not within provisions of Sec. 876 Code.* An assigned verbal contract for the sale of cotton at 7½ cents per pound is not within the provisions of Section 876 of the Code, which authorizes the endorsee to maintain an action upon all bonds, contracts and writings for the payment of money or other thing or the performance of any act or duty, assigned to him by endorsement.—*Ib.* 449.

ASSIGNMENTS OF ERROR.

See **APPEALS**.

ASSUMPSIT, ACTION OF.

1. *Pleading and practice; joint cause of action; discontinuance.* In an action of assumpsit against several defendants, where the complaint counts upon a joint cause of action against all of the defendants, and the record shows that each of the several defendants was served with process, the amendment of the complaint before the introduction of the evidence, by striking out one of the defendants, constitutes a discontinuance of the action against the remaining defendants.—*Evans Marble Co. v. McDonald & Co.*, 139.

ATTACHMENT.

1. *Attachment insufficient; affidavit, writ and bond can be amended.* Any irregularity or defect of form, or of substance in an affidavit for an attachment in the bond or writ of attachment, may, under provisions of the statute, (Code § 564) be amended before or during the trial.—*Webb & Stagg v. McPherson Co.*, 540.

ATTORNEY.

1. *Same; argument of counsel; effect of showing for absent witness.* In such case, where the state has admitted showings of certain witnesses for the purpose of going to trial, a statement of the solicitor that the State did not thereby admit the truth of such testimony, but that if the witnesses were present they would swear as there shown was proper.—*Smith v. State*, 14.
2. *Same; argument of counsel.*—In such a case, remarks of the solicitor to the jury on the word "beast" used in a letter received by the prosecutrix from defendant, in the place of "best," that the defendant characterized himself by the use of the word "beast," are mere expressions of opinion, and unobjectionable.—*Weaver v. State*, 33.

ATTORNEY—*Continued.*

3. *Unlawful detainer; sufficiency of written demand for possession by attorney of landlord.*—While the statute gives the agent or attorney of a landlord, the authority to make a written demand upon the tenant for delivery of possession, before such a landlord can maintain an action for unlawful detainer, it must be shown by the evidence that the attorney who makes the demand was in fact at the time it was made, the attorney of the landlord; and the subsequent bringing of the suit by an attorney does not create the presumption that he was the landlord's attorney at the time the written demand was made.—*Barnewell v. Stephens*, 609.
4. *Mortgage; stipulation for payment of attorney's fee.*—The provision contained in a mortgage that the proceeds of the sale from the mortgage should be devoted, first, to the payment of the expenses of said sale, "including a reasonable attorney's fee for collecting said sum, whether by foreclosure of under order of sale, or by proceedings in court or otherwise," is sufficient to authorize the allowance of an attorney's fee for filing a bill in equity to foreclose said mortgage.—*Langley v. Andrews*, 655.

BANKS.

1. *Deposit of money in bank by husband in name of wife; when cannot be drawn out by wife.*—Where a husband deposits money in a bank in the name of his wife, receiving a book showing that an account was opened in the name of the wife, and that she was credited with the amount of the deposit, and at the same time he delivered to the bank a signature card which contained the direction in the name of the wife, that in the payment of funds and other transactions the signature to be recognized by the bank was the name of the wife per the husband making the deposit, upon the death of said husband, the wife cannot draw out the money remaining on deposit on check bearing her signature, nor can she recover such money in a suit against the bank.—*First National Bank of Montgomery v. Taylor*, 456.

BILL OF EXCEPTIONS.

1. *Bill of exceptions; when properly stricken from the file.*—Where it appears from the record in a case that the bill of exceptions was not signed within the time prescribed by law, or within the time fixed by order of the court, such bill of exceptions will not be considered on appeal, and will be stricken from the file on motion; and where by order of the court the defendant in a criminal case is given "until January 5th, 1905," in which to have the bill of exceptions signed by the presiding judge, the time for signing the bill of exceptions expires on the night of January 4th, and if the time is extended on the 5th of January, it is after the expiration of the time allowed by order of the court.—*Richardson v. State*, 12.
2. *Pleading and practice; how exceptions reserved considered on appeal.*—A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted.—*Dickens v. State*, 49.
3. *Construction of act creating city court of Gadsden; rule of practice on appeal; trial by court without jury.*—Under the statute creating and establishing the city court of Gadsden (Acts 1900-1, p. 1298) providing that where a cause is tried by the

BILL OF EXCEPTIONS—Continued.

- court without a jury, "either party may, by bill of exceptions, also present for review the conclusions and judgment of the court on the evidence," etc., the appellate court cannot review the correctness of the conclusion and judgment of the court upon the evidence, unless it is disclosed in the bill of exceptions that an exception was reserved thereto.—*Fleming v. State*, 52.
4. *Trial and its incidents; general request for charges by defendant; how reviewed on appeal.*—The recital in bill of exceptions that the defendant "asked the court to give the following charges in writing, to-wit:" followed by four charges numbered consecutively, does not show that the court was separately requested to give each of said charges; and the court cannot be put in error for refusing to give said charges unless there was error in refusing all of them.—*Yeats v. State*, 58.
 5. *Trial without jury; conclusion and judgment of the court upon the evidence must be shown in bill of exceptions, and exception must be shown, before same can be reviewed on appeal.* In the trial of a cause by the court without the intervention of a jury the bill of exceptions must show what the conclusion and judgment of the trial court on the evidence were, and unless the same are disclosed, the Supreme Court is without jurisdiction to review the action of the trial court in that behalf, although it may appear from the minute entry what judgment was rendered. If the bill of exceptions discloses the judgment but fails to contain an exception thereto, the ruling of the trial court cannot be reviewed.—*Morey v. Monk*, 175.
 6. *Same; same; case at bar.*—Section 14 of the Acts of 1875-6, providing for the trial of causes by the City Court of Selma, without a jury, authorizes a review by the Supreme Court of the conclusion and judgment of the City Court of Selma upon the evidence, only when such conclusions and judgment are shown in the bill of exceptions and the bill of exceptions contain exceptions thereto.—*Ib.* 175.
 7. *Trial and its incidents; refusal to give charge when not reviewed.*—Where the only recital in a bill of exceptions relative to the refusal of the court to give a charge requested, is "The defendant, in writing, requested the general charge for the defendant, but the court refused to give the same, to which action of the court refusing to give the general charge in favor of the defendant, he duly excepted," and the charge referred to is not set forth in the bill of exceptions, the Supreme Court will not review the rulings of the trial court in refusing said charge.—*Lunsford v. Bailey & Howard*, 319.
 8. *Appeal; motion to strike pleading must be shown by bill of exceptions.*—Where a complaint is stricken from the file on motion by the defendant, in order for ruling to be reviewed on appeal, it is necessary that the motion and the ruling thereon and the exception thereto, should be shown by a bill of exceptions.—*Henry v. N. C. & St. L. Ry.*, 336.
 9. *Bill of exceptions; when sufficiently shown to have been signed within the time allowed by order of the court.*—Where a bill of exceptions purports to be signed in September, 1900, but the day of signature is not specified, and it was shown that there was an order of the court made allowing 30 days for signing a bill of exceptions, without specifying when that period should begin or end, and it does not appear when the court adjourned, but under the statute the court could have continued to a time within 30 days next before September, and there is at the conclusion of the bill of exceptions an

BILL OF EXCEPTIONS.—*Continued.*

affirmation that the same was signed within the time allowed by the court. such recital is a *prima facie* showing that the bill of exceptions was signed on the day within 30 days as fixed by order of the court, and in the absence of evidence contradicting such recital, the bill of exceptions will not be stricken on motion, and will be considered on appeal.—*Carroll v. Warren*, 397.

10. *Rulings on motion to quash should be shown by bill of exception on appeal.*—The rulings of the trial court on motion to quash a writ of attachment, service, etc., will not be reviewed on appeal unless such rulings are presented by a bill of exceptions.—*Seaboard Air Line v. Hubbard*, 546.
11. *Same; same; rulings of the trial judge upon the admissibility of evidence may be reviewed, when properly presented by bill of exceptions, when the judgment and conclusions on the evidence cannot be reviewed.*—The fact that the judgment of the trial court, where a cause is tried without a jury, cannot be reviewed on appeal, because the bill of exceptions fails to show what the judgment was and fails to note exceptions thereto, does not prevent the review by the Supreme Court of the rulings of the trial judge upon the admissibility of evidence (Overruling *Alabama Fruit Growing and Winery Association v. Garner*, 119 Ala. 70.)—*Morcy v. Monk*, 175.
12. *Same; same; same; case at bar.*—In an action by the heirs at law of an intestate to recover, from the step-son of such intestate, the amount paid by a benefit society to such step-son, on an insurance policy in such society, where the laws of the State and the rules of the order, at the time the policy was issued, required that the beneficiary be either a "member or members of his family, blood relations or person or persons dependent on him" the ruling of the trial court as to the facts, and the soundness of his conclusions and judgment, where same are not shown by the bill of exceptions and exception shown to have been taken thereto, are presumed to have been correct, unless based on evidence improperly admitted.—*Id.* 175.

See APPEALS.

BOARDS OF REVENUE.

1. *Board of Revenue of Montgomery County; local act requiring appointment not repealed by general election.*—The local Act approved Feb. 28, 1903, providing that the members of the Board of Revenue of Montgomery County should be appointed by the Governor, is not repealed by the general election law approved Oct. 9, 1903, which provides for the election of different State and County officers.—*State ex rel. Tyson v. Houghton*, 90.

BONDS.

1. *Corporations; when bond issue invalid.*—A corporation in this State cannot issue bonds except for money, labor done, or property actually received (Constitution, Sec. 234; Code, § 1270); and, therefore, where the officers of a corporation have authorized the issuance of bonds which are to be distributed among the stockholders, such issuance is unauthorized and may be restrained at the suit of a stockholder. *American I. & I. Co. v. Crane*, 620.
2. *Official bonds; payable and conditioned as required by statute regardless of stipulations in bond.*—A bond intended by the obligor thereon to be the official bond of a public officer, and

BONDS—Continued.

under which said public officer acts, is, by force of the statute (Code § 3070, 3087, 3089) the official bond of such officer, and in legal contemplation and effect such bond is payable and conditioned as the statute requires the official bond of such officer to be payable and conditioned; and it is, therefore, of no consequence that the bond so executed is payable and conditioned differently from that which the statute requires for official bonds, or that the conditions expressed in the bond may not have been broken by the officer.—*U. S. F. & G. Co. v. Union T. & S. Co.*, 532

See OFFICERS.

CASE, ACTION ON.

1. *Action on the case; sufficiency of complaint.*—A count of a complaint which avers that the defendant removed and converted to his own use certain cotton and other farm products which were raised by a tenant of the plaintiff, and upon which the plaintiff had a lien as a landlord, and for advances, and that at the time of so removing and converting said property, the defendant knew of the existence of said lien, and that by said removal or conversion said lien and the remedy for its enforcement were lost to the plaintiff, states a substantial cause of action of trespass on the case.—*Baker v. Cotney*, 567.

CERTIORARI.

1. *Justice of the peace; common law certiorari; judgment cannot be rendered against sureties on certiorari bonds.*—The statute which provides that when on certiorari the judgment is affirmed, judgment must be rendered against the sureties on the certiorari bond, as well as the principal (Code § 493), applied exclusively to statutory certiorari; and when a bond is given for common law writ of certiorari, to bring up to the circuit court, the proceedings before a justice of the peace, upon the affirmance of the judgment, it is error to render judgment against the surety on the certiorari bond.—*Webb & Stagg, v. McPherson & Co.*, 540.

CHANCERY.

1. JURISDICTION AND GENERAL PRINCIPLES.

1. *Injunction; equity jurisdiction; evidence relating to lease of land.*—Where at the time of leasing a certain tract of land, the lessee is the colonel of a regiment of the Alabama National Guards, and the lease contract is made to the lessee in his own name, and thereafter an encampment of said regiment is held upon the leased premises, the proof of the fact that the lease contract was made, not for the lessee individually, but for the benefit of his said regiment, and that it was the regiment's lease, and not the lessee's, can be made, if at all, as well in a suit at law by the lessee against the lessor for a breach of contract of lease, as in a court of equity; and the necessity of making such proof as a defence to the claim of the lessee, constitutes no ground for a resort to a court of equity by the lessor for the purpose of enjoining an action at law.—*Cox v. O'Neal*, 314.
2. *Surety; right to enjoin collection of judgment pending suit against principal.*—Suit was brought against a surety upon a bond for the faithful performance of a contract entered into by the principal with the plaintiff. The plaintiff obtained judgment on which execution was issued. Subsequently the same plaintiff instituted a suit against the principal in the

CHANCERY—*Continued.*

bond for the breach of the contract for the performance of which the bond was given. The defendant in the last suit interposed defenses by setting up pleas in bar. Thereupon the surety against whom the judgment had been recovered filed a bill against the plaintiff to enjoin the collection of the judgment against it, until the final adjudication of the suit by said plaintiff against the principal in the bond, in which bill it was averred that the pleas at bar introduced by the principal were true. There were averred no general grounds of equitable jurisdiction to enjoin the collection of the judgment. *Held*: that the surety could not maintain such a bill to enjoin the collection of the judgment.—*Damp. Habil v. U. S. F. & G. Co.*, 365.

3. *Guardian and ward; jurisdiction of probate courts and of chancery courts.*—The jurisdiction of the probate courts and courts of chancery are concurrent in matters of guardianship, and the ward has an unqualified right of electing the forum in which he will seek a settlement of the guardianship.—*Matthew v. Mauldin*, 434.
4. *Dissolution of partnership; equity of bill in chancery.*—Where one of the members of a partnership has been excluded from the business of his firm, and the stock of goods owned by the firm has been taken into the possession of the other member of the partnership in collusion with a third party, the partner so excluded can maintain a bill for the dissolution of the partnership.—*Gillett v. Higgins*, 444.
5. *Dissolution of partnership; appointment of receiver.*—Where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled a decree for dissolution, it is proper to appoint a receiver of the partnership's assets in business.—*Ib.* 444.
6. *Same; same.*—Where a bill is filed for the settlement and dissolution of a partnership, and the complainant also asks for the appointment of a receiver, and it is averred that the defendant partner sold out the firm's goods, and turned over the business to strangers, to the utter exclusion of the complainant, and in utter disregard of his rights and interests, there is made out a *prima facie* case for the appointment of a receiver even without notice of the application.—*Ib.* 444.
7. *Appeal does not lie from refusal of court to vacate an order appointing a receiver.*—An appeal does not lie from the refusal of the court to vacate an order appointing a receiver; such order being merely interlocutory, and not being one from which under the statute an appeal can be taken.—*Ib.* 444.
8. *Bill by tenants in common for sale of lands; when sale properly ordered, notwithstanding failure to make proof that lands could not be equitably divided.*—Where a bill is filed by tenants in common against other co-tenants for the purpose of having the lands sold, and the proceeds divided among the tenants, and it is averred in the bill that said "lands cannot be equitably divided among the tenants in common aforesaid, without a sale thereof," and in their answers the defendants fail to deny this averment in said bill, the fact that there was no evidence introduced that the lands could not be equitably partitioned, does not make a decree ordering the sale erroneous, if complainant is otherwise shown to be entitled to such relief; since the failure on the part of the defendants to deny such averment of the bill was an admission of the truth of that averment in said bill, the fact that there was no evidence introduced that the lands could not be equitably partitioned,

CHANCERY—*Continued.*

does not make a decree ordering the sale erroneous, if complainant is otherwise shown to be entitled to such relief; since the failure on the part of the defendants to deny such averment of the bill was an admission of the truth of that averment, dispensing with the necessity for evidence.—*Berry Lumber Co. v. Garner*, 488.

- 9 *Statutory bill to quiet title; what possession necessary to maintain it.*—To maintain a bill under the statute to compel determination of claims to real estate and to quiet title thereto, it must be shown that complainant was in the peaceable possession of said property as contradistinguished from contested or disputed possession.—*Randle v. Daughdrill*, 490.
- 10 *Same; same; sufficiency of evidence.*—In such cases where the evidence shows that the land in question was wild and uncultivated land; that the defendant claims under a deed; pays taxes thereon; has kept trespassers off said property, and has taken tan bark therefrom, it cannot be said that the plaintiff is shown to have such peaceable possession as entitles him to relief.—*Ib.* 490.
11. *Equitable relief; defendant at law not barred after judgment rendered; laches.*—A defendant in a suit at law having only a purely equitable defense to the cause of action stated in the complaint, is not barred of his equity by the mere fact that he waits to file his bill until judgment has been entered against him in the suit at law, and such delay in asking for relief in a court of equity does not constitute laches.—*Hooper v. Birchfield*, 138 Ala. 423, overruled.—*Humphries v. Adkins*, 517.
12. *Marriage; jurisdiction of chancery court to annul marriage contract; duress.*—Where a party is by duress coerced into entering into marriage and the marriage ceremony is had under the supposed authorization of a marriage license, which license was invalid, and there has never been any co-habitation of the parties as man and wife after the ceremony, the person so coerced to enter into such marriage can maintain a bill to have annulled and declared void such pretended marriage.—*Hawkins v. Hawkins*, 571.
13. *Dismissal of bill for want of equity; possibility of amendment no ground for retention against.*—The possibility that a bill in equity which shows a want of equity, could be amended so as to give it equity, affords no ground for its retention against a motion to dismiss.—*Edins v. Murphree*, 617.

II. PLEADING AND PRACTICE.

1. BILLS AND PARTIES THERETO.

14. *Bill to enforce vendor's lien; when lien not shown to have been waived.*—In a bill filed to enforce a vendor's lien, it was averred that certain specifically described lands were conveyed to the defendants upon the recited consideration "of love and affection and the sum of \$600 cash in hand paid;" that the lands were sold under an agreement of sale with the father of the grantees named in said deed and one of the grantees who was not a minor; that the grantees were nieces and nephews of the grantor; that the land so conveyed was worth \$2,000, and the grantor desired to make an advancement to the grantees therein to the extent of \$1400; and that the other part of the purchase money amounting to \$600 was to be paid to the grantor; that evidencing the \$600 notes were given by the father of the grantees and the one of the grantees who was not a minor. *Held*: that the vendor's lien to the

CHANCERY—*Continued.*

- extent of \$600 was not lost by reason of the fact of the taking of the note signed by the father of the grantees and the one of the grantees who was not a minor.—*Acree v. Stone*, 156.
15. *Same; proper parties to such bill.*—In such a case the legal title to the lands conveyed by the grantor being in the grantees who were children of one of the makers of the note, such grantees were proper parties defendant to the bill.—*Id.* 156.
 16. *Bill to remove cloud from title; when cannot be maintained by purchaser.*—One who is holder of a bond executed by the owner of lands conditioned to make him a title to the lands described in said bond, upon the payment by him of the purchase money, cannot maintain a bill to remove a cloud from the title to said lands until he has paid the purchase money as provided in said bond.—*Bradley v. Bell*, 383.
 17. *Bill to redeem under a mortgage; when husband of complainant necessary party.*—Where a bill is filed by a married woman, who claims title by a deed from her husband to have a deed to certain lands executed by her and her husband to a third party declared a mortgage and to have the same annulled on the ground of payment, or to be allowed to redeem, if the mortgage indebtedness is not paid, the husband of the complainant is a necessary and indispensable party to the suit, and the failure to make him a party is fatal to obtaining the relief prayed for; and of this defect the court can take notice *ex mero motu*.—*Marbury L. Co. v. Harriet Posey*, 394.
 18. *Bill to quiet title; inconsistency in averments of same.*—A bill to quiet title, which alleges that the complainant has title and is in possession, and that the defendant has no right, title, estate or interest in the land and prays that defendant show what claim or title he has, and that the court quiet complainant's title and decree that defendant has no title, and which also alleges that the legal title is in defendant, but that the defendant holds it in trust for complainant, and containing no appropriate prayer for the enforcement of said trust, is inconsistent, and subject to demurrer.—*Long v. Mechem*, 405.
 19. *Liability of different sets of sureties on guardian's bond.*—A bill by a ward against the guardian and several sets of sureties on his bond is not bad on the ground for misjoinder, and multifariousness.—*Matthews v. Mauldin*, 434.
 20. *Statutory bill to quiet title; what possession necessary to maintain it.*—To maintain a bill under the statute for the determination of claims to real estate and to quiet title thereto, it is necessary for the complainant to aver and prove that at the time of the institution of the suit the complainant's possession to the lands involved was peaceable, as contradistinguished from disputed or contested possession, and that it was under claim of ownership.—*Lyon v. Arndt*, 486.
 21. *Equity pleading and practice; when relief can be given under general prayer.*—Where a bill in equity seeks to have certain conveyances cancelled and annulled upon the ground that they are absolutely void, and the averments of the bill and its prayer for specific relief are based upon such theory, but such bill also contains a prayer for general relief, if upon the averments and proof it is shown that the transaction while not void *ab initio* was voidable, and the complainant was entitled to have the conveyances annulled, the relief can be had under the general prayer.—*Mobile Land Imp. Co. v. Gass*, 520.

CHANCERY—*Continued.*

- 22 *Bill to redeem; when statutory requirements sufficiently complied with.*—In a bill filed to redeem lands from a sale under an execution, where it is averred that the purchaser has absented himself from the State, that the complainant has made diligent inquiry to ascertain his post office address, has repeatedly written to him asking for an account of the lawful charges claimed by him to have been paid, has requested his vendees to inform him what lawful charges are claimed by them; and that the original purchaser and his vendees has each refused to give any information; and that the complainant has made diligent inquiry as to the lawful charges, and has paid into court the amount of all lawful charges he has been able to ascertain, and offers to pay all other lawful charges which may be ascertained by the court: such averments show a sufficient excuse for failure of the complainant to pay the lawful charges, and authorize the maintenance of a bill to redeem.—*Francis v. White, Admr.*, 590.
23. *Bill to redeem; sufficiency of averments as to tender of lawful charges.*—On a bill to redeem property sold under execution, where it is averred that the complainant has ascertained that the purchaser at said sale had paid designated amount as a tax levied by the city wherein the property was located, which said amount "is herewith tendered and offered to said defendant, as well as the further sum of \$41.76. legal interest on the amount of said assessment," such averment of tender is not sufficient: in that, it fails to aver that the amount is paid into court—it appearing that the purchaser is absent from the State. *Ib.* 590.
24. *Statutory right of redemption; where lands are purchased by several parties, tender not required to be made to each of the purchasers.*—Where property is sold under execution, and the purchaser at said sale subsequently sells separate portions of said property to two or more other parties, in order for the original owner to redeem the lands so sold, it is not necessary that he should make a tender of the purchase price, together with the other charges fixed by the Statute, to the original purchaser and each of his vendees; but, under such circumstances, the defendant, by redemption, can come into equity by paying into Court the money which the law requires, and ask the Court to distribute it to the parties according to their respective interests and rights, and offer to do and pay whatever more additional thereto may be just and equitable; and upon such averments and offer, he can maintain a bill to redeem.—*Ib.* 590.
25. *A bill to redeem; sufficiency of offer to pay for execution of deed.* Where a bill is filed in a court of equity seeking to redeem lands sold under execution, and the complainant offers to pay all lawful charges and asks for information as to their amount, the cost of executing a deed will be considered as included in complainant's offer to do equity.—*Ib.* 590.
- 26 *Bill for discovery; sufficiency of averment.*—A bill filed by simple contract creditors against their debtors for discovery of assets under the statute (Code, § 819), which avers that the defendants are indebted to the complainants in certain various amounts, that the defendants have no visible means subject to legal process of value sufficient to pay the claims of complainants; that the defendants have no property standing in their own name or in the name of the partnership of which they are members, which can be reached or subjected to legal process for the satisfaction of the claims of complainants, but that defendants have property, real or personal, or money

CHANCERY—*Continued.*

or effects or choses in action, or have an interest in real or personal property, money, effects or choses in action, which are, and should be subject to the payment of complainants' claim, but the kind and description of the property and how the same is held are kept concealed and hidden by defendants, and are unknown to complainants, and that a discovery is necessary to enable complainants to reach and subject the property to their respective claims, is sufficient in its averments to authorize the maintenance of such bill; and is not subject to demurrer upon the ground that it is not shown by such averments that the property sought to be discovered would not be exempt from the payment of complainants' claims.—*Kinney v. Reeves*, 604.

27. *Bill for discovery; sufficiency of affidavit.*—Where a bill is filed by creditors against a common debtor seeking a discovery of assets of the defendant, and it is averred in the bill that each of the complainants is a non-resident of the State, the verification of such bill by the affidavit of one of the complainants' counsel in which the affiant states that the complainants were absent from the State, shows a sufficient reason why the verification was made by one of the counsel for the complainants, (Rule 15 of Chancery Practice, Code, p. 1205.)—*Ib.*, 604.
28. *Same; same.*—Where the averments of the bill for discovery are positive and are not made upon information and belief, the verification of such bill by an affidavit made by one of complainants' counsel, which states that the complainants are absent from the State, and that the statements contained in the bill of complaint are true, is sufficient.—*Ib.*, 604.

2. CROSS-BILLS: PLEAS: DEMURRERS: MOTIONS:

ANSWERS.

29. *Equity pleading; when demurrer to whole bill properly overruled.*—A demurrer to a bill in equity as a whole, is properly overruled, if for any equity disclosed in said bill, the plaintiff is entitled to relief.—*Cronk v. Cronk*, 214.
30. *Equity pleading and practice; new matter in answer not considered on motion to dissolve injunction.*—On a motion to dissolve an injunction on the denials of the answer, the court's consideration is confined to matters which are in denial of the averments of the bill; and new matter averred in the answer by way of defense will not be considered.—*Agee v. L. & N. R. R. Co.*, 344.
31. *Dismissal of bill for want of equity; possibility of amendment no ground for retention against.*—The possibility that a bill in equity which shows a want of equity, could be amended so as to give it equity, affords no ground for its retention against a motion to dismiss.—*Edins v. Murphree*, 617.
32. *Appeal; from decree on demurrer must be prosecuted within 30 days.*—If an appeal from a decree upon a demurrer to a bill in equity is taken after the expiration of 30 days from the rendition thereof, the Supreme Court is without jurisdiction to entertain such appeal, and the same will be dismissed.—*Dennis v. Currie*, 637.
33. *Equity pleading; no reversible error to fail to pass upon a demurrer.*—Where a bill in equity is not subject to a demurrer interposed thereto, the fact that the chancellor omitted to rule upon said demurrer, notwithstanding it was embraced in the note of submission, constitutes no error prejudicial to the respondent.—*Langley v. Andrews*, 665.

CHANCERY—*Continued.*

34. *Equity pleading; when answer of one of defendants can be considered and read as evidence.*—As a general rule, the answer of one defendant is not good against another, but when the right of a complainant as against one defendant is only prevented from being complete by some question between the complainant and a second defendant, the answer of the second defendant may be considered and read in evidence.—*Id.*, 665.
35. *Bill to foreclose mortgage; when answer of the assignor of the mortgage will be considered and read in evidence against the mortgage.*—Where the assignee of a mortgage files a bill against both the mortgagor and assignor to foreclose said mortgage, and execution of the mortgage is proved, and the assignor by answer admits the assignment, the complainant will be entitled to a decree, notwithstanding the mortgagor may deny all knowledge of the assignment.—*Id.*, 665.
36. *Appeal does not lie from decree overruling a motion to dismiss cross-bill.*—An appeal does not lie to the Supreme Court from a decree of a chancellor overruling a motion to dismiss a cross-bill for the want of equity therein; the statute authorizing an appeal from an interlocutory decree overruling a motion to dismiss a bill for the want of equity, (Code § 427) having application solely to a bill in equity, and not a cross-bill.—*McGough v. Holliday*, 185.

3. HEARING AND DECREES.

37. *Mandamus; not awarded for ordering vacation of chancellor's decree, dismissing a bill in equity.*—Where upon a motion made by some of the defendants in a chancery suit to dismiss the bill for the want of equity, the chancellor renders a decree, granting said motion, and ordering the bill dismissed, the complainant cannot obtain a writ of mandamus, ordering the vacation of said order of dismissal, and the restoration of said defendants as parties to said bill.—*Ex parte Merritt*, 115.
38. *Decree in chancery suit; when shown to be final.*—Where a bill is filed by a mortgagor to redeem certain lands from one alleged to be the mortgagee, and the defendant files an answer and cross bill, claiming that he was not in possession of said lands as a mortgagee, but as a purchaser, and prays in his cross bill to be allowed to retain possession of the land as a purchaser, a decree which, after reciting that the cause was submitted on pleading and proof, then recites, "on consideration thereof, it is ordered, adjudged and decreed" that the demurrer to the cross bill is overruled, that the cross complainant is not entitled to relief, and the cross bill is dismissed; and that the complainants are entitled to relief and to redeem the property; and there then follows directions for the making of an accounting before the register, such a decree is a final decree, which will support an appeal.—*Gentry v. Lawley*, 333.

4. PROCEEDINGS BEFORE REGISTER.

39. *Sale of lands by register; when properly set aside.*—Where lands are sold by the register in chancery under order of the court, and upon exceptions to the confirmation of the sale, and on application to have the sale set aside and a new sale ordered, it is made to appear that a much larger price will be paid for the property on a resale, and such price is guaranteed by a deposit of money with the register, and there is evidence

CHANCERY—*Continued.*

tending to show the inadequacy of the price paid at the sale by the register, the chancellor does not err in refusing to confirm such sale and in setting it aside.—*Montague v. International Trust Co.*, 544.

III. INJUNCTION.

40. *Right of railroad company to enjoin another railroad company from laying its track along streets of city.*—A railroad which maintains a track along a street in an incorporated city, and owns lands abutting on said streets, can maintain a bill to enjoin another railroad company from constructing its track along said street, and from crossing its right-of-way and track along said street, said second railroad company not being authorized by law so to do.—*M., J. & K. C. R. R. Co., v. L. & N. R. R. Co.*, 152
41. *Injunction; equity jurisdiction; evidence relating to lease of land.*—Where at the time of leasing a certain tract of land, the lessee is the colonel of a regiment of the Alabama National Guards, and the lease contract is made to the lessee in his own name, and thereafter an encampment of said regiment is held upon the leased premises, the proof of the fact that the lease contract was made, not for the lessee individually, but for the benefit of his said regiment, and that it was the regiment's lease, and not the lessee's, can be made, if at all, as well in a suit at law by the lessee against the lessor for a breach of contract of lease, as in a court of equity; and the necessity of making such proof as a defence to the claim of the lessee, constitutes no ground for a resort to a court of equity by the lessor for the purpose of enjoining an action at law.—*Cox v. O'Neal*, 314.
42. *Common carrier; when shown; discrimination in use of track; injunction.*—Where a railroad company operates a track lying adjacent to business houses, which is not one of its regular side tracks, but is known as a "house track," and for several years continuously serves the persons occupying the business houses located along said track, by delivering at their respective places of business, cars of freights and cars to be freighted and shipped, such railroad company becomes thereby a common carrier with respect to the use it has made of said track, and as such common carrier it is under obligations to treat the public without unfair discrimination; and one of the owners of business conducted along said track can maintain a bill in equity to enjoin said railroad company from making unlawful and unjust discrimination against him by discontinuing serving him by placing cars for him on said track, while furnishing cars to others along the same track.—*Agee v. L. & N. R. R. Co.*, 344.
43. *Equity pleading and practice; new matter in answer not considered on motion to dissolve injunction.*—On a motion to dissolve an injunction on the denials of the answer, the court's consideration is confined to matters which are in denial of the averments of the bill; and new matter averred in the answer by way of defense will not be considered.—*Ib.*, 344.
44. *Bill to enjoin stringing of wires along the street; condition of ordinance; does not change the rule as to necessity of averments of facts.*—Where an electric light company which is operated in a city, and has its wires strung upon poles along the streets of said city, files a bill to enjoin another light company from stringing its wires along a street which is occupied

CHANCERY—Continued.

by the complainant, and it is averred that the defendant company held a franchise from said city for the purpose of furnishing electric light, power, etc., and that said franchise contained a special proviso which obligated the defendant to so erect its poles and wires as "not to interfere with the poles and wires of complainant," the existence of such proviso in the franchise granted to the defendant, does not change the rule of law that the complainant in seeking its injunction must by its bill show the necessity for the injunction prayed for by the statement of facts, and not by the mere statement that the complainant will be irreparably damaged.—*Montgomery L. & W. P. Co. v. Citizens L. H. & P. Co.*, 462.

45. *Same; same; same.*—In such a case where the averments of the bill upon which the prayer for an injunction is based, are that complainant "is informed and believes, and upon such information and belief avers the facts to be that" the defendant intends to proceed and string its wires on poles already erected on said street, and make necessary connections therein, which "will interfere with the poles and wires of your orator, and irreparably damage your orator's wires and make it impossible for your orator to furnish lights," etc., according to contract, and that said defendant has connected its wires with one place of business along said street, and is furnishing light thereto, and that "it is dangerous to the life and property of the citizens of Montgomery for the defendant to be allowed to connect its wires," in the manner above stated, such averments are mere conclusions of the pleader, and are insufficient, in that they do not set out facts upon which issue can be joined, testimony taken and a decision had as to whether irreparable injury will be inflicted or danger incurred, etc.—*Ib.*, 462.

IV. RECEIVERS.

46. *Dissolution of partnership; appointment of receiver.*—Where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled a decree for dissolution, it is proper to appoint a receiver of the partnership's assets in business.—*Gillett v. Higgins*, 444.
47. *Same; same.*—Where a bill is filed for the settlement and dissolution of a partnership, and the complainant also asks for the appointment of a receiver, and it is averred that the defendant partner sold out the firm's goods, and turned over the business to strangers, to the utter exclusion of the complainant, and in utter disregard of his rights and interests, there is made out a *prima facie* case for the appointment of a receiver even without notice of the application.—*Ib.*, 444.
48. *Appeal does not lie from refusal of court to vacate an order appointing a receiver.*—An appeal does not lie from the refusal of the court to vacate an order appointing a receiver; such order being merely interlocutory, and not being one from which under the statute an appeal can be taken.—*Ib.* 444.
49. *Corporation; when directors should not be removed or receiver appointed.*—Where a bill is filed by a stockholder of a corporation, complaining of malfeasance and mismanagement on the part of certain directors, and asking that such directors be removed from the management of the affairs of the company and be enjoined from exercising any of the powers of stockholders or directors, and for the appointment of a receiver for the corporation, and a dissolution of the corporation, and it appears from the bill that the business of the corporation was not confined to the execution of the contracts and transactions

CHANCERY—*Continued.*

in which it was alleged the said designated directors were unfaithful to the corporation's interest, and it is not shown that said directors have any adverse interest in such independent business, nor does it appear that there is any mismanagement of the corporation in relation to the same, there is shown no ground for the appointment of a receiver or for removing said directors from the management of the affairs of the company, or restraining them from exercising powers as stockholders or directors of the corporation.—*Donald v. Manufacturere's Export Co.*, 581.

CHARGES OF COURT TO JURY.

1. *Reasonable doubt; charge of court in reference thereto.*—On the trial of a criminal case, a charge is erroneous and properly refused which instructs the jury that "before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is inconsistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant's guilt, that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty."—*Toliver v. State*, 3.
2. *Homicide; alternative averments.*—Under an indictment for murder alleging the means or instrument with which the killing was done in the alternative—"by hitting him or by striking him with a hatchet or with some blunt instrument to the grand jury unknown"—a charge which instructs the jury to find the defendant not guilty if the grand jury knew from the evidence before them the means or instrument used in producing death, is properly refused unless limited to the count containing the averment that the means were unknown. *Smith v. State*, 14.
3. *Same; charge to jury.*—Charges which invade the province of the jury are properly refused.—*Ib.*, 14.
4. *Same; same; reasonable doubt.*—A charge that "a reasonable doubt is a doubt for which a reason can be given," is bad and properly refused.—*Ib.*, 14.
5. *Same; same; conviction of manslaughter under indictment for murder.*—Under an indictment in the Code form (Code Section 4923, No. 63) the defendant may be convicted of manslaughter, and a charge to the jury to acquit the defendant if there is no proof of any material allegation of murder, is properly refused.—*Ib.*, 14.
6. *Same; same; freedom from fault.*—Charges to the jury under an indictment for murder to acquit the defendant under his plea of self-defense if he was reasonably without fault in bringing on the difficulty, are properly refused.—*Ib.*, 14.
7. *Same; same; constituents of self-defense.*—A charge to the jury under an indictment for murder which fails to set forth the constituents of self-defense, is properly refused.—*Ib.*, 14.
8. *Seduction; charge to jury.*—In such a case, where there is evidence that the prosecutrix yielded to the defendant as the result of a promise of marriage, a charge which instructs the jury that "if the evidence satisfies you beyond a reasonable doubt that Mollie Jerkins surrendered her virtue and had sexual intercourse with defendant as a result of a promise of marriage made to her by defendant, but that said promise was made by defendant and said Mollie Jerkins surrendered her virtue in 1898, then your verdict must be for the defendant,"

CHARGES OF COURT TO JURY—*Continued.*

- is properly refused as she may have surrendered her virtue in 1898 and yet if she yielded to him in 1901 she would be entitled to the protection of the statute.—*Weaver v. State*, 33
9. *Same; same; chastity of prosecutrix.*—In such a case a charge is erroneous which instructs the jury to find the defendant not guilty if he had intercourse with the prosecutrix prior to the time mentioned by her, as she may have been mistaken in the exact date and if she had previously fallen she may have reformed and if she then yielded to him under promise of marriage she would be entitled to the protection of the statute.—*Ib.*, 33.
10. *Same; same; same.*—In such a case, a charge is erroneous which instructs the jury that they could infer the unchastity of the prosecutrix because the State did not produce testimony as to her character.—*Ib.*, 33.
11. *Same; same; corroboration of prosecutrix.*—In such a case, where there was evidence that defendant was overheard to tell the prosecutrix that he loved her, that he visited her frequently for several years, that after the commission of the offence he left the community, that he wrote letters to her containing acknowledgments of his relations with her and of his promise of marriage, the jury might have found that the prosecutrix was corroborated within the requirements of the statute, and a charge instructing the jury to acquit the defendant for want of such corroboration, is properly refused. *Ib.*, 33.
12. *Same; same.*—In such a case a charge is properly refused which instructs the jury to acquit the defendant unless the prosecutrix yielded on account of a promise of marriage where the jury might have found that she yielded as the result of "arts" or "flattery."—*Ib.*, 33.
13. *Same; same; corroboration of prosecutrix.*—In such a case it is not necessary for the prosecutrix to be corroborated by other testimony as to the promise of marriage and it is sufficient if she is corroborated as to either of the material facts so as to satisfy the jury that she was worthy of credit.—*Ib.*, 33.
14. *Same; same.*—Charges which are contradictory, confusing or involved are properly refused.—*Ib.*, 33.
15. *Same; same; willingness of prosecutrix.*—In such a case, a charge is properly refused which instructs the jury to find the defendant not guilty if the prosecutrix was willing to commit the offence, since such willingness may have been the result of his arts or flattery.—*Ib.*, 33.
16. *Larceny of crude turpentine; when evil intent and felonious taking a question for the jury.*—On a trial under an indictment for the larceny of crude turpentine while in the boxes cut into the trees, where there was evidence tending to show that the defendant was dipping turpentine for a third party, and that he was not beyond the line of the property owned by such third party, and that the turpentine was taken from the boxes by the defendant in the day time, the question of evil intent and felonious taking which are ingredients of larceny, is a question for the jury, and the general affirmative charge requested by the defendant is properly refused.—*Dickens v. State*, 49.
17. *Trial and its incidents; general request for charges by defendant; how reviewed on appeal.*—The recital in bill of exceptions that the defendant "asked the court to give the following charges in writing, to-wit:—" followed by four charges numbered consecutively, does not show that the court was separately requested

CHARGES OF COURT TO JURY—*Continued.*

- to give each of said charges; and the court cannot be put in error for refusing to give said charges unless there was error in refusing all of them.—*Yeats v. State*, 58.
- 18 *Charge of court to jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that before the defendant can be convicted, "each and everyone of you must be persuaded beyond a reasonable doubt to a moral certainty, and to the exclusion of every reasonable hypothesis" of defendant's guilt as charged, is erroneous and properly refused.—*Ib.*, 58.
 19. *Same; charge of court to jury; not error to repeat charges.*—The repetition by the court of sound and material pertinent legal propositions in charging the jury, is not error, though such repetition is effected by giving two identical charges at the request of the plaintiff.—*Birmingham Ry. L. & P. Co. v. Rutledge*, 195.
 20. *Same; when general charge properly given for plaintiff.*—Under the evidence adduced on the trial, there being but one conclusion open to the jury,—that the plaintiff was injured through the negligence of defendant's employees in bringing a car of which they had control and on which plaintiff was a passenger, in contact with an engine running on the bisecting track of a railroad company, the court properly gave the affirmative charge for the plaintiff.—*Ib.*, 175.
 21. *Same; same; when not error to refuse charge.*—Where the affirmative charge on the case generally was given for the plaintiff, the refusal of the court to charge in favor of defendant, on one of the counts of the complaint, if error, involved no injury to the defendant.—*Ib.*, 175.
 22. *Same; same; jury judges of damages to be awarded.*—In such a charge that "the jury are the sole judges of the damages to be awarded," is correct.—*Ib.*, 175.
 23. *Same; same; non-recoverable items of physician's bill.*—The fact that some of the items which made up the bill rendered to plaintiff by his physician, for services, are not recoverable in this cause, does not warrant an instruction to the jury to disregard the doctor's bill.—*Ib.*, 175.
 24. *Charge; what erroneous.*—In a suit by a passenger against a carrier for failure to carry her to her destination, when the undisputed testimony shows that she left the car in which she was riding, and went into another car, which was left on a side track at an intermediate station with her in it, and the plaintiff's testimony tends to show that both the conductor and flagman of the train on which she was riding instructed her to make the change, and the flagman testifies that he gave the plaintiff no such instructions, and had nothing to do with her changing cars, and the conductor is not examined, being dead, it is error to instruct the jury that "Unless they are reasonably satisfied that the conductor and flagman told plaintiff to get in the wrong car, and thus was left, then they must return a verdict for the defendant." *Robertson v. L. & N. R. R. Co.*, 216.
 25. *Action of trespass; charge of court to jury.*—In an action of trespass to recover damages for the alleged taking of several mules, a charge of the court which instructs the jury that if they believe the evidence in the case, "they will find for the defendant as to the last mule that was taken" from the plaintiff is properly refused.—*Fulgham v. Carter*, 227.
 26. *Same; charge as to theft of mules.*—In such a case, the fact that the person from whom the plaintiff purchased the mules was convicted in the Federal court for stealing said mules, is not

CHARGES OF COURT TO JURY—*Continued.*

- involved in any issues, and a charge in reference thereto is properly refused.—*Id.*, 227.
27. *Same; same.*—In such a case, a charge is properly refused as calculated to confuse the jury which instructs them as follows: "Even if the jury believe from the evidence that Jamar and Holmes were wrong in taking the property, and that the property was the property of the plaintiff, Carter, they cannot find a verdict for the plaintiff, unless the jury further believe that Jamar in taking said property was acting by the authority of Fulgham in the taking thereof."—*Id.*, 227.
 28. *General charge; when improper.*—Where the plaintiff in a forcible entry and detainer suit, in order to establish possession of the part of land in dispute, shows actual possession of another part of said land conveyed by a deed, and there is evidence tending to show that while holding actual possession under the deed of part of the land conveyed, there was a disclaimer of ownership and title as to the part in dispute, the general charge in favor of plaintiff should not be given, but it should be left to the jury to decide whether plaintiff had possession of the disputed lands.—*Bailey v. Blackshear Co.*, 254.
 29. *Effect of contradictory statements as to credibility of the witness' testimony; charge in relation to.*—A charge to the jury that "if any witnesses have made contradictory statements as to material facts in this case, this may, in the discretion of the jury, create a reasonable doubt as to the truth of the evidence of such witnesses" does not assert a correct legal proposition and is properly refused. (*Overruling Gregg v. State*, 106 Ala., 14; *Wilbourn v. State*, 114 Ala. 19)—*Brown v. State*, 287.
 30. *Charge containing a statement of undisputed fact.*—A charge to the jury as follows: "Did the defendant commit an assault upon Grady Cox with a knife. There is evidence that he did," is proper when the fact of such assault with a knife is undisputed.—*Id.*, 287.
 31. *Deadly weapon; knife will be so considered if it cuts through the clothing.*—A charge that the "law pronounces it a deadly weapon if you should find from the evidence that it cut through the clothing," is proper.—*Id.* 289.
 32. *Charge as to degree of conviction with which jury should regard defendant's guilt in order to render verdict of guilty.*—A charge that "if, after considering all the evidence, you have a fixed conviction of the truth of the charge,—you are satisfied beyond a reasonable doubt—then it is your duty to convict this defendant," is correct.—*Id.* 289.
 33. *Degree of doubt necessary to support acquittal; mere possible doubt insufficient.*—A charge to the jury that "the doubt which will justify an acquittal must be actual and substantial—not a mere possible doubt—because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt" is correct.—*Id.*, 289.
 34. *Possibility of innocence insufficient to justify acquittal.*—A charge to the jury that "if you believe from the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible he is not guilty, you must convict him," is correct.—*Id.*, 289.
 35. *Credibility of witnesses and weight given to the testimony, jury is judge of.*—A charge to the jury that "you are the sole judge as to the credibility of the witnesses and the weight that should be given to the testimony" is correct.—*Id.*, 289.
 36. *A charge which is a mere argument should not be given.*—A charge that "the jury must try this case by the evidence and

CHARGES OF COURT TO JURY—*Continued.*

- not by the jokes of the counsel" is a mere argument intended to answer the opposing counsel, and is properly refused. *Ib.*, 289.
37. *Same; acquittal of defendant who is doubtfully guilty.*—A charge that "the law is as much vindicated by turning loose the doubtfully guilty as by convicting the guilty" is a mere argument and is properly refused.—*Ib.*, 289.
 38. *Reasonable doubt as to any material fact insufficient to justify acquittal; charge to that effect.*—A charge that "if the jury have any reasonable doubt of any material fact in this case, they must acquit the defendant" is bad.—*Ib.*, 289.
 39. *Assault with intent to murder; if defendant, had death ensued, would only have been guilty of manslaughter in the first degree, he cannot be found guilty of.*—In a prosecution for assault with intent to murder, if the defendant, had death ensued, would only have been guilty of manslaughter in the first degree, he cannot be found guilty, where death did not ensue, of assault with intent to murder.—*Ib.*, 289.
 40. *Same; same; charge must define what is manslaughter in the first degree.*—A charge to the jury that "if the jury believe from the evidence that if Cox had died it would only have been manslaughter, in the first degree, the jury cannot find defendant guilty of an assault with intent to murder" is properly refused, because it refers a question of law to the jury and leaves it to them to define what is manslaughter in the first degree.—*Ib.*, 289.
 41. *Evidence; charge as to effect of.*—A charge to the jury that "if the jury believe that defendant had made friends with Cox in good faith and that Cox then began to abuse defendant about the butter and cursed defendant and struck him in the face and that defendant then inflamed by the blow suddenly cut Cox with his knife, you cannot convict him of assault with intent to murder" is properly refused.—*Ib.*, 289.
 42. *Same; same.*—A charge that "if the jury believe from the evidence that Cox was following Brown over the yard and that Cox suddenly attacked him and struck him in the face and the jury believe that Brown suddenly inflamed by this blow cut Cox with a knife, defendant cannot be found guilty of an assault with intent to murder" is properly refused.—*Ib.*, 289.
 43. *Assault with intent to murder; reasonable doubt as to specific intent; charge in relation thereto.*—A charge that "if the jury have a reasonable doubt growing out of the evidence whether defendant assaulted Grady Cox with the specific intent to kill him, you must acquit the defendant," is bad.—*Ib.*, 289.
 44. *Action for personal injury resulting in death; charges; abstract and argumentative charges should be refused.*—If the facts hypothesized in a charge are abstract and the charge is argumentative said charge is properly refused.—*K. C. M. & B. Ry. Co. v. Matthews*, 298.
 45. *Same; same; when refusal to give proper charge error without injury.*—If a proper charge requested of the court by the defendant is refused but another charge to the same effect is given by the court at the request of the defendant the error is cured.—*Ib.*, 298.
 46. *Same; same; when charges as of contributory negligence properly refused.*—Written charges requested by the defendant upon contributory negligence which fail to hypothesize that said negligence in point of fact contributed to the injury complained of, are bad.—*Ib.*, 298.
 47. *Same; same; what improper charge in reference to cause of death of injured person.*—In an action for personal injuries

CHARGES OF COURT TO JURY—Continued.

- resulting in the death of the injured person, where the accident took place in November, 1899, and the death occurred in July, 1900, a charge to the effect that if the jury believe from the evidence that the death of the plaintiff's intestate was caused directly by disease occurring after April 1, 1900, then they must find for the defendant, is bad, in that it fails to negative the fact that the disease was caused by or was the result of the accident.—*Ib.*, 298.
48. *Same; when affirmative charge is properly refused.*—Where there is evidence tending to prove the allegations of the complaint the affirmative charge for the defendant is properly refused.—*Ib.*, 298.
49. *Trial of civil case; not necessary to authorize verdict.*—In the trial of a civil case, it is only necessary in order to authorize a verdict that the jury should be reasonably satisfied; and therefore, a charge which instructs the jury that they must be satisfied to a "reasonable certainty," before they can return a verdict, is erroneous, as exacting too high a degree of proof. *Sou. Ry. Co. v. Aldredge & Shelton*, 368.
50. *Action upon a note; failure of consideration; general affirmative charge.*—In an action upon a promissory note, where the defendant pleads a failure of consideration, to which special plea the plaintiff files a special replication, and there was evidence supporting the plea setting up a failure of consideration, and there was no evidence introduced by the plaintiff to prove the material affirmance of his replication, the defendant is entitled to the general affirmative charge, and it is not error for the court to give such charge at defendant's request.—*Carroll v. Warren*, 397.
51. *Charge to jury; error to single out particular facts.*—It is error in a charge to the jury to give undue prominence to particular facts upon which the defendant hypothesizes a particular phase of his defense.—*Montgomery St. Ry. v. Rice*, 674.
52. *Same; rate of speed; when question for jury.*—In an action against a street railway company to recover damages for injury to a mule, alleged in the complaint to have been caused by the willful or wanton negligence of the defendant, where the evidence shows that the accident occurred at the intersection of two streets where the mule could not have been seen by the motorman until the car had reached the crossing, the question as to whether running the car at the rate of 5, 6 or 7 miles an hour at such place was wilful or wanton negligence, is a question for the jury.—*Ib.*, 674.

CHECKS.

See BANKS.

CIRCUIT COURTS.

See COURTS SUB-TITLE.

CITY COURTS.

See COURTS, SUB-TITLE.

CODE.

- § 28. Action upon assigned contract to sell; not within statute. *Snead v. Bell*, 449.
- § 306. Insolvent estate; filing of claim; applies to judgment against intestate not to judgments against administrator.—*Woodall v. Wright*, 205.
- § 427. Cross-bill; appeal does not lie from motion to dismiss. *McGaugh v. Holliday*, 185.
- § 493. Appeal from Justice of the Peace; judgment cannot be rendered against sureties on common-law certiorari bond.—*Webb & Stagg v. McPherson*, 541.

CODE—*Continued.*

- § 564. Attachment; cannot be abated for irregularity or defect in affidavit, writ and bond.—*Ib.*, 541.
- §§ 732-3. Sale of land for division; deposition of witnesses should be suppressed when there is no notice of filing of interrogatories.—*Edwards v. Edwards*, 268.
- § 1044. Trust estate; does not descend to heir of trustee, or pass to personal representative; executor of will does not succeed to right to administer.—*Whitehead v. Whitehead*, 163.
- §§ 1065-6. Penalty for failure to enter partial payment of mortgage debt on record.—*Travis v. Rhodes*, 189.
- § 1270. Corporation; issue of bonds, except for money, labor done, or property actually received, is unauthorized and may be restrained.—*American Ice & I. Co. v. Crane*, 620.
- § 2619. Penalty on insurance company member of tariff association not unconstitutional.—*Continental Ins. Co. v. Parkes*, 650.
- § 3070. Official bonds; condition and surety.—*U. S. F. & G. Co. v. Union T. & S. Co.*, 532.
- § 3087. Official bonds; legal effect thereof.—*Ib.* 532.
- § 3089. Official bonds; effect when not properly executed.—*Ib.* 532.
- § 3181. Sale of land for division; depositions of witnesses should be suppressed when there is no notice of filing of interrogatories.—*Edwards v. Edwards*, 268.
- § 3315. Jurisdiction; verdict and judgment in City or Circuit Court for \$13.50. in action of assumpsit for \$100, amount claimed not being reduced by set-off, should be dismissed upon motion.—*Smith v. Allen*, 148.
- §§ 3417-39. Quo warranto; does not lie to prevent threatened unlawful exercise of franchise.—*State ex rel. Johnson v. Mayor, &c. Ensley*, 661.
- § 4923. Obtaining money under false pretenses; indictment; Code form sufficient.—*Johnson v. State*, 1.
Murder; indictment under Code form; defendant may be convicted of manslaughter.—*Smith v. State*, 14.
Selling property on which there was a lien; indictment; Code form sufficient.—*Tallent v. State*, 47.

COMMON CARRIER.

1. *Suit by passenger for failure to carry to destination; what sufficient complaint in.*—Where the suit is by a passenger against a common carrier, a complaint which alleges that the plaintiff purchased a ticket entitling her to transportation as a passenger, from Birmingham to Belle Ellen, and that she took passage on a train running between these points; that before reaching Yolandy, an intermediate station, she was told by the conductor or the flagman on said train, that the car in which she was then riding would not go to Belle Ellen, but would go to Brookwood, and that she must change cars at Yolandy, and a car in front of hers was pointed out by them as the car for Belle Ellen; that acting on such directions she went into the car designated by them, and as a consequence of doing so, she was left in said car on the side track at Yolandy, while the train including the car in which she had previously ridden, went on to Belle Ellen, discloses a good cause of action.—*Robertson v. L. & N. R. R. Co.*, 216.
2. *Same; what complaint need not allege.*—In such a case, the gravamen of the action being, the defendants wrong in leaving the passenger at the intermediate point, instead of carrying her to her destination, so far as the right of recovery is concerned it is immaterial whether the alleged wrongful act

COMMON CARRIER—*Continued.*

- of the conductor or flagman was negligently, willfully, knowingly or even maliciously done, and the complaint need not use either of these terms in describing their action.—*Ib.*, 216.
3. *Same; what allegations proper in complaint.*—Though in such a case, the plaintiff is entitled to recover if her failure to reach her destination was caused by any act of the conductor or flagman, she may, for the purpose of fixing the amount of her damages, aver and prove that they acted maliciously, or with circumstances of aggravation.—*Ib.*, 216.
 4. *Same; what proper defense in.*—In such case, the general issue is the only proper plea. If defendants wrong had any causal connection with the result complained of, it is of no consequence that the plaintiff could have avoided the result by making other inquiries as to the proper car for her to take, or anything of that sort. The plaintiff had the right to rely implicitly on what the trainmen told her in this connection, and to act accordingly, and consequently there is no room for pleas of contributory negligence.—*Ib.*, 216.
 5. *Passenger; changing cars and failing to reach destination, when carrier liable.*—Where a passenger, with a ticket entitling her to be carried between two points, embarks on a car running between these points, and before arriving at her destination, changes into another car, which though up to that time forming a part of the train on which she was then riding, is left, with her in it, at an intermediate station, and she thereby fails to reach her destination, the carrier is liable to her if the change of cars was made at the instance of, or in obedience to instructions from the conductor or flagman on the train.—*Ib.*, 216.
 6. *Same; when carrier not liable.*—In such case, if the passenger changes into the car of her own motion, and without fault or inducement on the part of the trainmen, in the mistaken belief that it, and not the car in which she had previously ridden, would go to her destination, and in consequence was left at an intermediate station, the carrier is not liable.—*Ib.*, 216.
 7. *Charge; what erroneous.*—In a suit by a passenger against a carrier for failure to carry her to her destination, when the undisputed testimony shows that she left the car in which she was riding, and went into another car, which was left on a side track at an intermediate station with her in it, and the plaintiff's testimony tends to show that both the conductor and flagman of the train on which she was riding instructed her to make the change, and the flagman testifies that he gave the plaintiff no such instructions, and had nothing to do with her changing cars, and the conductor is not examined, being dead, it is error to instruct the jury that "Unless they are reasonably satisfied that the conductor and flagman told plaintiff to get in the wrong car, and thus was left, then they must return a verdict for the defendant."—*Ib.*, 216.
 8. *Evidence; what improper.*—In such a case, the plaintiff cannot testify, whether any one was left except herself, or who was her companion on the trip, or whether such companion changed cars in the same manner as she did.—*Ib.*, 216.
 9. *Same.*—Nor, in such a case, can the plaintiff testify that a night watchman and a section foreman of defendant, who had nothing to do with the running of the train, saw her crying at the station where she was left, and after she had told them that she was left, did nothing to assist her.—*Ib.*, 216.

COMMON CARRIER—*Continued.*

10. *Same.*—It is not competent to prove the fact that the plaintiff was a witness in another case against the defendant, involving a charge of improper conduct against the same conductor and flagman, as independent evidence to show that they willfully or maliciously caused her to be left short of her destination.—*Ib.*, 216.
11. *Liability of owners of ferry as common carrier.*—Where a passenger on a ferry boat continues in immediate charge and custody of his wagon and team during the passage on a ferry boat and assumes to control the team during the passage across the river, the ferry owners are not liable as common carriers in respect of the loss of his property, resulting from the team backing off into the river, but only for their negligence causing that disaster.—*Frierson v. Frazier*, 232.
12. *Liability of owners of ferry; contributory negligence.*—In an action against ferry boat owners to recover damages for the loss of team backing into the river, where the issue of contributory negligence was involved, with evidence tending to support same, a charge to the jury that "If from the evidence you are reasonably satisfied that the defendant was guilty of negligence and that such negligence was the direct cause of the injuries complained of, your verdict should be for plaintiff" is improper.—*Ib.*, 232.
13. *Same; liability to passenger transported free.*—Where no charge or compensation is made or to be made, and no compensation is to be exacted, directly or indirectly, for the transport of plaintiff's property, and this is so understood by him at the time, the ferry owners are liable to him only for the consequences of gross negligence.—*Ib.*, 232.
14. *Same; where transportation without fee is part of contract for work.*—If the plaintiff, in action for recovery of damages for loss of team while crossing river on ferry boat, has a contract for work with the owners of the ferry boat and the customary money fee for transportation is not exacted from him in consequence of the fact that the transport was being made in carrying out a contract for work which he had with that company and the pretermission of the usual charge was in any sense a part of that contract, the attempted transport is not gratuitous and the rights of the plaintiff are the same as if regular toll had been exacted.—*Ib.*, 232.
15. *Safe-guards of a ferry; credibility of testimony.*—Where it is shown that a ferry boat did not have a rear guard, evidence to the effect that subsequent to the accident, the ferry owners did install a rear-guard is not admissible to prove such installation as an independent abstract fact, but is competent on the cross-examination of defendants themselves after they had testified that there was no occasion for such safeguard in a properly constructed boat and that it was not customary to have such rails on other properly equipped and operated ferryboats, as going to the credibility of such testimony.—*Ib.*, 232.
16. *Action for personal injuries against common carrier; what allegations in complaint sufficient to state cause of action.*—A count in a complaint for personal injuries resulting in death which alleges that the plaintiff's intestate was a passenger on the railroad of the defendant and that said intestate as such passenger was through and by the carelessness and negligence of the defendant's servants, agents, or employees, violently thrown from the train and so greatly injured, etc.,

COMMON CARRIER—*Continued.*

- by the injuries thus sustained that he never recovered therefrom but soon after died on account of said injuries, states a cause of action.—*K. C., M. & B. Ry. Co. v. Mattheus*, 298.
17. *Same; what defects in complaint not noticed on appeal.*—Although said count does not in terms aver that the injury resulted from the defendant's negligence, nor that the servants from whose negligence the injury is alleged to have resulted, were in charge of the train, or the like, no assignment of demurrer having specified this objection to the count, said defect will not be noticed on appeal.—*Ib.*, 298.
 18. *Same; when not necessary to aver quo modo of the infliction complained of.*—Where the complaint shows the duty of carrier by defendant to intestate and that he was injured by negligence on the part of the carrier's servants for which defendant was responsible an allegation in the complaint that decedent "was violently thrown from the train" is a sufficient allegation of the *quo modo* of the infliction.—*Ib.*, 298.
 19. *Same; when not necessary to describe in complaint the character of injuries suffered by decedent.*—Where the suit is instituted by a personal representative to recover damages for injuries causing the death of her intestate, it is not necessary to describe in the complaint the character of the injuries received by said intestate, it being sufficient to show causal connection between the injuries complained of and the death.—*Ib.*, 298.
 20. *Same; contributory negligence; not negligence as a matter of law to alight from a running train in the night time and at a dark and unlighted place.*—It is not negligence as a matter of law for a passenger to alight from a train running two or three miles an hour and at a dark and unlighted place. The question of negligence *vel non* is one of fact for the jury.—*Ib.*, 298.
 21. *Same; same; same.*—Even though so alighting from a moving train might involve some risk to so alight does not as a matter of law constitute negligence; it being a question of fact for the jury whether or not the risk involved was such as a man of ordinary care and prudence would take under the circumstances.—*Ib.*, 298.
 22. *Same; same; when evidence of complaints of the injured person as to his hurts admissible.*—In an action against a carrier for negligently injuring plaintiff's intestate, which injuries are alleged to have resulted in death, and where more than eight months intervened between the date of the infliction of the injuries and the death of the intestate, and where it is a question of fact as to whether the said death was the result of said injuries or was caused by disease, evidence of deceased's complaints of hurts attributable to the alleged negligence of the defendant made throughout the time intervening between the infliction of the injuries and the death are properly admitted by the court where such evidence is confined by the court to the expressions in respect of current conditions to the exclusion of narration of past conditions and of the causation of the present conditions complained of.—*Ib.*, 298.
 23. *Same; evidence; inability of deceased to perform manual labor after he was hurt admissible.*—In such case testimony of the deceased's wife that her husband was never able to do any manual labor after he was hurt is properly admitted.—*Ib.*, 298.
 24. *Common carrier; when shown; discrimination in use of track; injunction.*—Where a railroad company operates a track lying adjacent to business houses, which is not one of its

COMMON CARRIER—*Continued.*

regular side tracks, but is known as a "house track," and for several years continuously serves the persons occupying the business houses located along said track, by delivering at their respective places of business, cars of freights and cars to be freighted and shipped, such railroad company becomes thereby a common carrier with respect to the use it has made of said track, and as such common carrier, it is under obligations to treat the public without unfair discrimination; and one of the owners of business conducted along said track can maintain a bill in equity to enjoin said railroad company from making unlawful and unjust discrimination against him by discontinuing serving him by placing cars for him on said track, while furnishing cars to others along the same track.—*Agee v. L. & N. R. R. Co.*, 344.

25. *Action against common carrier; sufficiency of complaint.*—In an action against a common carrier to recover damages for failure to safely deliver goods shipped over its lines, a count of the complaint which is substantially in the form prescribed by the Code for suit against a common carrier on a bill of lading, with some additional averments made necessary by the suit being brought against the defendant as a connecting carrier, sufficiently states a cause of action and is not subject to demurrer.—*Walter v. Ala. Great Southern Ry. Co.*, 474.
26. *Same; contributory negligence no defense.*—In an action against a common carrier, which is not the initial carrier, for failure to safely deliver goods shipped over its line, a plea which sets up contributory negligence on the part of the plaintiff in that the goods were improperly loaded in the car of the initial carrier by plaintiff, or his agent, presents no defense and is subject to demurrer.—*Id.* 474.
27. *Same; same; same; sufficiency of plea.*—In an action against a common carrier for failure to safely deliver goods shipped over its line, a plea which after setting up as a defense the contributory negligence on the part of plaintiff then avers "that the goods were not injured or damaged while in the possession of this defendant" presents a defense, since if the goods were not damaged or injured while in the possession of the defendant there would be no liability on the part of the defendant.—*Id.* 474.
28. *Same; same.*—In such a suit where there were several connecting carriers and an action is brought against the delivering carrier, a plea which avers that the car in which plaintiff's goods were transported was received by defendant from a connecting carrier and was closed and sealed and so remained from the time of its delivery to defendant until it was delivered to plaintiff, and that the contents of the said car could not be seen by defendant without its breaking the seal and opening the car, and that the contents of the car was not visible or known to defendant when it was received from the connecting carrier, and that defendant hauled said carload of goods from the place where it was delivered to defendant to its place of destination in the same condition in which it was received, and delivered same to plaintiff in such condition, and that if said goods were damaged as alleged in the complaint it was not through the fault or negligence of the defendant, and is not subject to demurrer.—*Id.* 474.
29. *Action against common carrier; burden of proof.*—In an action against a common carrier for failure to safely deliver goods shipped over its lines, where it is shown that the defendant

COMMON CARRIER—*Continued.*

was one of several connecting carriers, and was the discharging or delivering carrier, and the contract of affreightment stipulated that the liability of each line is limited to loss of injury occurring on its line, if it appear that the goods were in sound condition when received by the initial carrier, and it is further shown that upon their delivery to the plaintiff they were in a damaged condition, the burden is upon the defendant to show that the damage or injury did not occur while the goods were in its possession or under its control, as a common carrier.—*Ib.* 474.

30. *Action against common carrier; right of consignee to maintain suit for damage to goods shipped over lines of common carrier, and there is no reservation of title by the consignor.* The consignee of goods has the right to sue for their loss or damage by a common carrier, notwithstanding he may not own all of the goods, or when another party may be the owner of them.—*Ib.* 474.
31. *Action by passenger for personal injuries; sufficiency of complaint.*—In a suit brought by a passenger against a street railroad company to recover damages for personal injuries, a count of the complaint which avers that "defendant was negligently operating said car at or near a point on defendant's line * * * that while plaintiff was engaged in or about to alight from said car, his body, as a proximate consequence of said negligence, was caused to leave said car and strike the street with great force and violence, whereby plaintiff was bruised," states a cause of action.—*Birmingham Ry. L. & P. Co. v. Glover*, 492.
32. *Same; same.*—In such an action a count of the complaint which avers that the plaintiff "had informed the defendant's servant, the conductor or motorman of said car, of his purpose and desire to alight from said car * * * , that it was and then became the duty of defendant's servant, after slackening and reducing the speed of said car, not to increase the speed of said car until plaintiff had alighted from said car, or had had a reasonable opportunity to alight from said car; that, notwithstanding said duty, the defendant's servant negligently, suddenly and greatly increased the speed of said car before plaintiff had alighted therefrom, and before plaintiff had had a reasonable opportunity to alight therefrom; that as a proximate consequence of said negligence," plaintiff suffered the injuries complained of,—is faulty in assuming instead of alleging that defendant's servant slackened the speed of the car, upon being informed that the plaintiff desired to alight therefrom, and in not alleging that it was the duty of defendant's servant to decrease the speed then and there; but said count is not subject to demurrer upon the ground that it does not appear therefrom that at the time of the increase of the speed of the car, the plaintiff was in the act of alighting therefrom, and said complaint states a cause of action.—*Ib.* 492.
33. *Same; same; when count does not charge willfulness, wantonness or recklessness.*—In such a case where a count of the complaint, after stating that plaintiff was a passenger, and that there was duty on the part of defendant's servant to plaintiff not to increase the speed of the car after being advised that plaintiff desired the car stopped that he might alight, then alleges that "the said motorman, the defendant well knowing that plaintiff was seeking to alight, and well knowing that a sudden jerk would probably throw plaintiff from the car, with wanton and willful, or reckless negligence, suddenly increased the speed of said car, and as a proximate

COMMON CARRIER—*Continued.*

- consequence thereof," plaintiff was thrown from the car and injured, such count of the complaint does not aver that the motorman wantonly, willfully or recklessly caused plaintiff's fall, and therefore pleas of contributory negligence on the part of plaintiff set up a defense to such count.—*Ib.* 492.
34. *Same; same; same.*—Such count is inapt, if not affirmatively bad as one alleging willful injury inflicted by the motorman in that it avers not that the motorman had knowledge of the probable disastrous consequence of his act, but that the "defendant" had such knowledge; and the knowledge of the defendant in its corporate capacity, is not sufficient to characterize the act of the plaintiff on the part of the motorman as being willful.—*Ib.* 492.
35. *Action against street railroad company by passenger; contributory negligence.*—Where a passenger upon a street car steps off the car backwards while it is going at the rate of 5 or 6 miles an hour, or with his face towards the rear of the car, he is guilty of contributory negligence, which precludes his recovery for injuries sustained, by reason of trying in this way to alight from the car.—*Ib.* 492.
36. *Action against railroad company for breach of contract of affreightment, admissible in evidence.*—In an action against a railroad company to recover damages for the breach of a contract of affreightment, a statement and a certificate made by the conductor of the defendant relating to a transaction that was past, having reference to the freight shipped over the defendant's line, is not admissible in evidence over the defendant's objection.—*Seaboard Air Line v. Hubbard*, 546.

See RAILROADS, SUB-TITLE.

CONDITIONAL SALES.

See SALES.

CONSTITUTIONAL LAW.

1. *Constitutional law; act creating 14th Judicial Circuit local law and unconstitutional.*—The act of the Legislature, approved March 6, 1903, "to create the 14th Judicial Circuit of the State of Alabama, and fix the time of holding court therein," etc., (Acts 1903, p. 88), is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply to the Legislature for the passage of such law not having been given as provided by section 106 of the Constitution, such law is unconstitutional and void.—*Walker v. State*, 7.
2. *Constitutional law; statute to regulate practice and procedure in the Circuit Court of Clay county unconstitutional.*—The provisions of the Act approved December 13th, 1898, "To further regulate the practice and procedure of the Circuit Court of Clay county," whereby it was intended to deprive that court of jurisdiction to try indictments thereafter returned into that court, and to deprive that court of a grand jury except when the same should be ordered by the judge of said court prior to the convening of said court (Local Acts 1898-99 p. 196), are violative of Section 5 of Article VI. of the Constitution of 1875 (Constitution 1901, § 143) and are therefore inoperative and void.—*Adcock v. State*, 30.
3. *Constitutional law; engaging in business of emigrant agent without obtaining license.*—The Act of the Legislature, approved October 1, 1903, "to prohibit emigrant agents from plying their vocation within the State without first obtaining

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a license therefor," is not violative of the 14th amendment of the Constitution of the United States, or of section 31 of the Constitution of Alabama; and said act is, therefore, valid.—*Kendrick v. State*, 42.

4. *Act creating Houston County; notice of intention to apply for the passage of the law creating said county sufficient.*—The notice given of the intention to apply to the Legislature of the State of Alabama of 1903, for the passage of a law creating a new county out of portions of Henry, Dale and Geneva Counties, was sufficient under Section 106 of the Constitution, and was not subject to constitutional objections, because it failed to state the boundaries of the new county, as defined and fixed in the act.—*Law v. State*, 62.
5. *Constitutional law; defacto judge.*—A person who is commissioned by the governor as judge of the Circuit Court in a certain designated circuit, and under such commission attempts to exercise the duties of the office of such circuit judge at a time when, and place where the circuit court for a particular county could be legally held, is a *de facto* judge of the Circuit Court of the State, although the Act of the Legislature which creates the judicial circuit to which he was appointed, was unconstitutional, and his appointment by the governor was void.—*Ex parte State ex rel Atty.-Genl.*, 88.
6. *Same; same.*—The acts of a *de facto* circuit judge at a time and place when and where the Circuit Court for a particular county can be legally held, are valid in so far as they concern the judge or third persons who have an interest in the things done until his title to the office is adjudged insufficient; and an indictment preferred by a grand jury organized by such judge at such time and place, is not void, and should not be stricken from the files of the court, although it is subsequently judicially ascertained that the act creating the said judicial circuit was unconstitutional and said judge's appointment was void.—*Ib.* 88.
7. *Constitutional law; detention of general law contra-distinguished as to local law.*—A law that is general in its terms and is in good faith so framed, that parts of the State may come within its operation, is a general law within the meaning of the constitution; and the fact that at the time of its passage there may be in the State certain localities where there are no objects for its present operation, or where there are special laws already in existence, which must be repealed before the general law becomes operative therein, does render such law any the less general law.—*State ex rel Covington v. Thompson*, 101.
- Same; the general election law a general and not a local law.* The act of the Legislature providing for the holding of general elections in the State of Alabama (Acts, 1903, p. 438), is not rendered a local law by the reason of the provision of section 106 of said Act which provides that the provisions thereof should apply to all primary elections, and all elections by counties and municipalities held in the State, "except in cases where the provisions thereof are inconsistent, or in conflict with the provisions of a law governing special primary, county or municipal elections."—*Ib.* 101.
- 9 *Constitutional law; when term of office of County Superintendent of Montgomery County expires.*—Under the Act "to provide for the election of the County Superintendent of Education of Montgomery County," approved Feb. 7th, 1899, (Acts, 1898-99, p. 676), providing that the County Superintendent of

CONSTITUTIONAL LAW—*Continued.*

Education of Montgomery County should be elected at the general election to be held on the first Monday in August, 1900, and at the general election every four years thereafter in the same manner as the other officers are elected; and that the term of office of said County Superintendent "shall begin on the first day of October next following such election and that he shall hold said office * * * * * under the laws governing public schools, and until his successor is duly qualified," a change of time in the holding of the general election in the State to November, has the effect only to postpone the time of the change in the office of County Superintendent of Education of Montgomery County until the new officer can be elected at the general election in November, and until he has qualified—the old officer simply holding over until his successor has been elected at the general election in November, and has qualified thereafter.—*Ib.* 101.

10. *Constitutional law; act repealing the county court of Clay county unconstitutional.*—The act approved September 18th, 1903, the purpose of which was to repeal an act establishing the county court of Clay county of law and equity jurisprudence, and several other acts relating to said county court (Local Acts 1903, p. 255), is unconstitutional and void, for the reason that the notice of intention to apply for the passage of such repealing act did not state the substance of the bill which was introduced and purported to be passed by the Legislature. *Hooten v. Mellon*, 245.
11. *Constitutional law; passage of local law.*—The Legislature of Alabama cannot enact a constitutional local law without violating Section 106 of the Constitution, when the notice of the intention to apply therefor, as required by said section, shows that the Act proposed to be enacted, if enacted as set forth in the notice, would be unconstitutional.—*Alford v. Hicks*, 355.
12. *Same; act to establish inferior civil court of Mobile County unconstitutional.*—The act of the Legislature of Alabama approved September 26th, 1903, entitled "An Act to establish an inferior civil court of Mobile County in lieu of Justices of the Peace for the City of Mobile," (Local Acts 1903, pp. 348-352), is unconstitutional and void, because the notice required by Section 106 of the Constitution to be given stated that the court proposed to be established should have jurisdiction to the extent of \$200.—*Ib.* 355.
13. *Constitutional law; validity of act establishing inferior court of Bessemer.*—A published notice that "a bill will be introduced in the next session of the legislature of the State of Alabama, to create and establish an inferior court in the city of Bessemer in precinct 33, Jefferson county, with both civil and criminal jurisdiction, as provided by sections 130 and 152, article 7 of the Constitution of the State," does not state the substance of the local act passed by the legislature establishing an inferior court of Bessemer in lieu of all justices of the peace of precinct 33 (Local Acts, 1903, p. 482); and said act establishing the inferior court of Bessemer is therefore unconstitutional and void.—*Tillman v. Porter*, 372.
14. *Constitutional law; act authorizing establishment of dispensaries in incorporated towns and cities in Walker County valid.* The act approved March 3, 1903, authorizing the establishment of dispensaries in incorporated towns and cities in Walker County, upon its ratification by a popular vote (Acts of 1903, p. 137), is constitutional and valid.—*Childs v. Shepherd*, 385.

CONSTITUTIONAL LAW—Continued.

15. *Constitutional law; sufficiency of affidavit accompanying notice of local law.*—An affidavit accompanying the notice given of the intention to introduce a local law as required by Section 106 of the Constitution, which is headed: "State of Alabama, Walker County," and then recites that before the officer certifying the affidavit there appeared a certain named person known "to be the editor and manager of the Mountain Eagle, a newspaper published at Jasper, in said County, who, being duly sworn, deposes and says that the attached notice was published once a week for four successive weeks in said newspaper before the making of this affidavit," is a sufficient affidavit and proof of notice, *Ib.* 385.
16. *Same; what is sufficient spreading of notice and proof upon the Journal.*—The pasting on the Journal of the House of Representatives and Senate of a newspaper clipping which contained the publication in full of a local bill, together with a typewritten copy of the affidavit of the publisher of the newspaper in which it was printed, constitutes a spreading of notice and proof of the intention to introduce such local bill in the Legislature, upon the Journal of each House, in compliance with Section 106 of the Constitution.—*Ib.* 385.
17. *Same; same.*—Where it appears from the Journal of each House of the Legislature that there was a joint resolution on the last day of the session of the Legislature which authorized the spreading upon the Journal of each House of the proof by affidavit of the publication of all local bills passed by the Legislature at that session, and that at the end of all of the proceedings of the last day of the session, as set forth in the Journal, there was a spreading thereon of the notices and proof of notices of local bills, including the one in question, followed by a recital of the final adjournment of the Legislature, certified by the presiding officer and attested by the secretary and clerk, there is shown a sufficient compliance with the provisions of Section 106 of the Constitution relating to such local bills.—*Ib.* 385.
18. *Constitutional law; act establishing dispensaries not invalid as granting exclusive privileges of selling intoxicating liquors by towns and cities in Walker County.*—The act of the Legislature authorizing all incorporated towns and cities in Walker County to establish and operate dispensaries, is not violative of Section 22 of the Constitution in that it grants to towns and cities of Walker County the exclusive privilege of selling intoxicating liquors.—*Ib.* 385.
19. *Same; validity of act authorizing establishment of dispensaries in towns and cities in Walker County.*—The act of the Legislature "Authorizing incorporated towns and cities in Walker County to establish and operate dispensaries," etc., is not unconstitutional and void, because it authorized the people of Walker County by their votes to ratify the provisions of said act repealing all existing laws on the subject of selling intoxicating liquors in said county which might be in conflict with said act.—*Ib.* 385.
20. *Constitutional law; Legislature may pass act to take effect upon some future event.*—The Legislature may pass a valid statute to take effect upon the happening of a future event, and such statute will not on that account be held unconstitutional.—*Ib.* 385.
21. *Same; same; local law.*—A valid local law may be passed by the Legislature to take effect by its ratification by the people of the county or district to be affected thereby.—*Ib.* 385.

CONSTITUTIONAL LAW—Continued.

22. *Municipal corporation; license for issuing trading stamps; validity thereof.*—An ordinance of the city of Montgomery requiring each merchant, doing business in said city, who shall issue any trading stamps in connection with his business, to pay "a license tax of \$100.00 therefor," and fixing a penalty of \$100.00 for each stamp issued without having taken out said license, is unconstitutional and void.—*City Council of Montgomery v. Kelly*, 352.
23. *Statutory provision that Insurance Company belonging to a tariff association pay penalty not unconstitutional.*—Section 2619 of the Code of Alabama providing that in case of loss an insurance policy issued by an insurer who belonged to or was a member of or in any wise connected with any tariff association or such like thing by whatever named called, etc., shall be construed to mean that the assured or beneficiary thereunder may in addition to the actual loss or damage suffered recover 25 per cent. of the amount of such actual loss, any provision or stipulation to the contrary in the policy notwithstanding is a legitimate exercise of the police power of the State.—*Cont. Ins. v. Parks*, 650.
24. *Same.*—Such statutory provision is not violative of the constitutional provision for singling out particular persons or corporations and discriminating against them.—*Ib.*, 650.
25. *Same; said provision applies to foreign Insurance Companies as well as domestic.*—The fact that the insurer happens to be a foreign corporation does not render the provision unconstitutional or void as to it.—*Ib.*, 650.
26. *Same; same; insurance companies are not engaged in inter-state commerce.*—Insurance companies organized in other states and issuing policies in this State are not engaged in inter-state commerce, nor are the contracts of insurance entered into by such companies in this State inter-state transactions.—*Ib.*, 650.
27. *Constitutional Law; act creating fifteenth judicial circuit; local law and unconstitutional.*—The Act of the Legislature, approved October 13, 1903, "to create the fifteenth judicial circuit of the State of Alabama, to be composed of the Counties of Autauga, Chilton, Elmore and Montgomery," is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply for the passage of this law not having been given as provided by section 106 of the Constitution, such law is void and unconstitutional.—*State ex rel Atty. Genl. v. Sayre, as Judge*, 641.
28. *Constitutional law; repeal of dispensary act as to Coffee County and prohibiting the sale of liquors in said county.*—A notice that application will be made to the Legislature "for the repeal of the law authorizing the establishment of dispensaries, so far as the said law relates to the county of Coffee, and forbids the commissioner's court of the county of Coffee from erecting dispensaries for said county," or a notice that application will be made to repeal "an act to authorize the municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate and prohibit the sale of said liquor, approved Feb. 18th, 1899, in so far as the same applies to the county of Coffee," does not set forth the substance of the act approved Sept. 25th, 1903, entitled "An act to repeal an act entitled an act to authorize municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further reg-

CONSTITUTIONAL LAW—*Continued.*

ulate or prohibit the sale of such liquors, approved on the 18th day of Feb. 1899, in so far as said act relates to the county of Coffee, and to prohibit the sale or giving away of such liquors in the county of Coffee, after the first Monday in January, 1904." (Local Acts, 1903, p. 316); and said last named act being a local act, is unconstitutional and void, as being offensive to Section 106 of the Constitution.—*Town of Elba v. Rhodes*, 689.

29. *Same; act establishing dispensaries in the town of Elba unconstitutional.*—The act approved Oct. 1st, 1903, entitled "An act to establish and regulate a dispensary in the town of Elba, Coffee County, Alabama, for the sale of spirituous, vinous and malt liquors, and to establish and perpetuate board of commissioners for the management of said dispensary." (Local Acts, 1903, p. 443), is unconstitutional and void, in that by its terms said act grants an exclusive right to the commissioners provided for therein as individuals, and their successors, to establish and maintain a dispensary, and thereby traffic in liquor, etc., in the town of Elba, and is therefore in violation of the organic law prohibiting monopolies, *Ib.* 689.

CONTINUANCES AND DISCONTINUANCES.

1. *Pleading and practice; joint cause of action; discontinuance.* In an action of assumpsit against several defendants, where the complaint counts upon a joint cause of action against all of the defendants, and the record shows that each of the several defendants was served with process, the amendment of the complaint before the introduction of the evidence, by striking out one of the defendants, constitutes a discontinuance of the action against the remaining defendants.—*Evans Marble Co. v. McDonald & Co.*, 130.

CONTRACTS.

1. *Construction of contract; intention of parties; ascertainment thereof.*—In construing contracts, the great object is to ascertain the intention of the parties and in ascertaining same, the court must place itself in the situation of the parties at the time of making the contract, and consider their obvious designs as to the purpose to be accomplished.—*McDonnell v. Jordan*, 280.
2. *Same; same; case at bar.*—Where there has been a contest over a will and one of the parties thereto, in a compromise settlement between the contestants, contracts that \$13,000 shall be paid to the other contestant, and that "no court costs or other charges arising from or connected with any proceeding concerning the contest or petition to probate the will shall attach to or be paid by" such other contestants and contracting himself "to pay all the court costs and lawful debts of the estate" such agreement applies to costs growing out of the contest or petition to probate the will which have been paid by the other party before the compromise settlement was made, as well as to those costs which had not been paid, and such other party can recover the amount so paid by him in costs. *Ib.*—280.
3. *Principal and agent; contract in name of principal.*—If a contract which is made with an agent discloses his principal and it appears on the face of the paper that the contract is really made on behalf of the principal, although it is signed by the agent as agent, such contract is one for the principal and not by the agent in his own behalf.—*Bronson v. Russell*, 360.

CONTRACTS—Continued.

4. *Assignment of verbal contract; if not for payment of money, need not be prosecuted in name of party really interested; Sec. 28 Code.*—When an assigned contract or agreement to sell an amount of cotton at a stipulated price, the breach of which is relied upon for a recovery, is not for the payment of money, either express or implied, it is not governed by section 28 of the Code, which requires the action, where such is the case, to be prosecuted in the name of the party really interested. *Snead v. Beil*, 449.
5. *Same; when contract not within provisions of Sec. 876 Code.* An assigned verbal contract for the sale of cotton at 7½ cents per pound is not within the provisions of Section 876 of the Code, which authorizes the endorsee to maintain an action upon all bonds, contracts and writings for the payment of money or other thing or the performance of any act or duty, assigned to him by endorsement.—*Ib.* 449.
6. *Contract of sale; right of rescision.*—Where by the fraudulent representation of a vendor in relation to material facts concerning the title of land, the falsity of which he has not the means of ascertaining and could not ascertain by reasonable diligence, one is induced to invest his money in the purchase of land, the purchaser can by bill in equity rescind the sale, and have the contract of purchase annulled.—*Rarden v. Badham*, 500.
7. *Same; same.*—If the vendor of lands falsely represents his title to be good, when it is not, and the purchaser relying on such representation, is thereby induced to enter into a contract to purchase said land, such misrepresentation, though made under an honest mistake as to the sufficiency of the title, entitles the purchaser to have the contract rescinded.—*Ib.* 500.
8. *Insanity; contracts of insane persons absolutely void.*—In this state, a contract of an insane person, whether it be a deed or any other form of contract, and whether written or resting in parol, is absolutely void; and therefore a party contracting with an insane person takes no benefit under such contract, nor acquires any title to property obtained by virtue of such contract.—*Walker v. Winn, Jr., Admr.*, 560.
9. *Execution of written instrument; what constitutes duress rendering instrument voidable.*—It is not the threat of a criminal prosecution in any case that constitutes duress which is deemed sufficient to avoid contracts, or to render invalid the execution of a written instrument, but the threat of criminal prosecution must be of such a nature and made under such circumstances as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the acts sought to be voided must be performed by said person while in said condition.—*Langley v. Andrews*, 655.
10. *Same; duress; ratification.*—A contract made under duress is only voidable and, therefore, the party upon whom duress has been imposed subsequently recognizes the validity of the contract involved, either by making payments thereon or otherwise he will be held to have elected to waive the duress and ratify the contract.—*Ib.*, 655.
11. *Mortgage; stipulation for payment of attorney's fee.*—The provision contained in a mortgage that the proceeds of the sale from the mortgage should be devoted, first, to the payment of the expenses of said sale, "including a reasonable attorney's fee for collecting said sum, whether by foreclosure of under order of sale, or by proceedings in court or otherwise," is sufficient to authorize the allowance of an attorney's fee for filing a bill in equity to foreclose said mortgage.—*Ib.*, 655.

CONVERSION.

See TRÖVER.

CORPORATIONS.

I. CORPORATIONS IN GENERAL.

1. *Conveyance by corporation; effect of corporate seal.*—In the execution of a written instrument by a corporation, the corporate seal attached to such instrument is a sufficient testimonial of the authority of the person who signs the corporate name as its president to so execute the paper.—*Collier v. Alexander*, 422.
2. *Corporation; relation of director and officer; when deed set aside.*—Where a director and officer of a corporation, in disregard and breach of his fiduciary relation, secures the corporate authorities to convey to him property of the corporation, such transaction is voidable, and the corporation can maintain a bill in its own name to have the deed conveying the property set aside and annulled.—*Mobile Land & Imp. Co. v. Gass*, 520.
3. *Same; same; same.*—Where one who is a director and secretary and treasurer of a corporation, at a meeting of the directors of said corporation in which it was necessary for such person to participate to constitute a quorum, induces said meeting to authorize a conveyance of the corporate property to him, and his vote secured the passage of said resolution, the subsequent conveyance of the property by the corporate authorities in accordance with said resolution can be set aside and annulled by a bill being filed in equity for such purpose by the corporation itself.—*Ib.*, 520.
4. *Corporation; when directors should not be removed or receiver appointed.*—Where a bill is filed by a stockholder of a corporation, complaining of malfeasance and mismanagement on the part of certain directors, and asking that such directors be removed from the management of the affairs of the company and be enjoined from exercising any of the powers of stockholders or directors, and for the appointment of a receiver for the corporation, and a dissolution of the corporation, and it appears from the bill that the business of the corporation was not confined to the execution of the contracts and transactions in which it was alleged the said designated directors were unfaithful to the corporation's interest, and it is not shown that said directors have any adverse interest in such independent business, nor does it appear that there is any mismanagement of the corporation in relation to the same, there is shown no ground for the appointment of a receiver or for removing said directors from the management of the affairs of the company, or restraining them from exercising powers as stockholders or directors of the corporation.—*Donald v. Manufacturers Export Co.*, 581.
5. *Corporations; when bond issue invalid.*—A corporation in this State cannot issue bonds except for money, labor done, or property actually received (Constitution, Sec. 234; Code, § 1270); and, therefore, where the officers of a corporation have authorized the issuance of bonds, which are to be distributed among the stockholders, such issuance is unauthorized and may be restrained at the suit of a stockholder.—*American I. & I. Co. v. Crane*, 620.

II. MUNICIPAL CORPORATIONS.

1. *Charter of City of Mobile; presentation of claim before suit.*
In an action against a city to recover damages for alleged

CORPORATIONS—*Continued.*

personal injuries, a statement giving the name and residence of plaintiff, the nature and elements of her injuries, when, where and how sustained, and the amount claimed, is a sufficient compliance, when properly filed, with the terms of the city's charter requiring that claims be presented to the city before suit; and the fact that the concluding clause of statement agrees to accept \$500 "By way of compromise or settlement in order to avoid litigation" does not destroy the effect of the claim as a statement.—*Bland v. City of Mobile*, 142.

2. *Same; same.*—In such an action, it is necessary that the complaint should aver the presentation of the claim sued on, and the evidence offered must correspond with the allegation of the complaint.—*Ib.*, 142.
3. *Same; same; amount claimed.*—The general rule that a plaintiff can recover less than he claims in his complaint, does not apply to suits against a city, where such city's charter requires that no claims against the city can be sued on until a statement of such claim has been filed with the city clerk for consideration of the city council; and a claim setting forth one amount as damages is not admissible in evidence to support the allegations of a complaint claiming a different amount as damages.—*Ib.*, 142.
4. *Municipal corporations; when resolution not of a permanent character.*—An ordinance passed by the city council of a municipality, granting permission to an electric light company to maintain for a period of twenty days its line of wire, as then strung along a certain designated street in said city, and to make all necessary connections therewith, and which provide that the same should not become effective unless officials of the company obligate themselves "at the expiration of twenty days to replace said wires in accordance with such ordinance and regulations of the city code as may then be in force," is not a resolution of a permanent character within the meaning of an ordinance of said city which requires the vote of the majority of the members of the city council to adopt a resolution or ordinance of permanent operation.—*Montg. L. & W. P. Co. v. Citizens L. H. & P. Co.*, 462.
5. *Municipal corporation; license for issuing trading stamps; validity thereof.*—An ordinance of the city of Montgomery requiring each merchant, doing business in said city, who shall issue any trading stamps in connection with his business, to pay "a license tax of \$100.00 therefor," and fixing a penalty of \$100.00 for each stamp issued without having taken out said license, is unconstitutional and void.—*City Council of Montgomery v. Kelly*, 552.

CO-TENANCY AND CO-TENANTS.

See TENANTS IN COMMON.

COURTS.

I. CIRCUIT COURTS.

1. *Constitutional law: act creating 14th Judicial Circuit local law and unconstitutional.*—The act of the Legislature, approved March 6, 1903, "to create the 14th Judicial Circuit of the State of Alabama, and fix the time of holding court therein," etc., (Acts 1903, p. 88), is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to

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COURTS—*Continued.*

- apply to the Legislature for the passage of such law not having been given as provided by section 106 of the Constitution, such law is unconstitutional and void.—*Walker v. State*, 7.
2. *Constitutional law; statute to regulate practice and procedure in the Circuit Court of Clay county unconstitutional.*—The provisions of the Act approved December 13th, 1898, "To further regulate the practice and procedure of the Circuit Court of Clay county," whereby it was intended to deprive that court of jurisdiction to try indictments thereafter returned into that court, and to deprive that court of a grand jury except when the same should be ordered by the judge of said court prior to the convening of said court (Local Acts, 1898-99 p. 196), are violative of Section 5 of Article VI. of the Constitution of 1875, (Constitution 1901, § 143) and are therefore inoperative and void.—*Adcock v. State*, 30.
 3. *Indictment; invalid when preferred by grand jury at a time not legally held.*—An indictment which is preferred by a grand jury organized at a term of the Circuit Court which is held at a time not authorized by law, is void, and will not support a judgment of conviction.—*Skinner v. State*, 46.
 4. *Constitutional law; de facto judge.*—A person who is commissioned by the governor as judge of the Circuit Court in a certain designated circuit, and under such commission attempts to exercise the duties of the office of such circuit judge at a time when, and place where the circuit court for a particular county could be legally held, is a *de facto* judge of the Circuit Court of the State, although the Act of the Legislature which creates the judicial circuit to which he was appointed, was unconstitutional, and his appointment by the governor was void.—*Ex parte State, ex. rel. Atty-Gen'l.*, 88.
 5. *Same; same.*—The acts of a *de facto* circuit judge at a time and place when and where the Circuit Court for a particular county can be legally held, are valid in so far as they concern the judge or third persons who have an interest in the things done until his title to the office is adjudged insufficient; and an indictment preferred by a grand jury organized by such judge at such time and place, is not void, and should not be stricken from the files of the court, although it is subsequently judicially ascertained that the act creating the said judicial circuit was unconstitutional and said judge's appointment was void.—*Ib.*, 88.
 6. *Jurisdiction of circuit and city courts; when judgment for less than limit of jurisdiction, suit should be dismissed.*—Where, in an action of assumpsit brought in the circuit or city court to recover \$100.00, the verdict and judgment are for \$13.50, and the amount claimed was not reduced by reason of a set-off successfully made by the defendant, said judgment, being below the minimum amount of the court's jurisdiction, should, upon motion made by defendant, be set aside and the suit dismissed, (Code, Sec. 3315).—*Smith v. Allen*, 148.
 7. *Constitutional law; act creating fifteenth judicial circuit; local law and unconstitutional.*—The Act of the Legislature, approved October 13, 1903, "to create the fifteenth judicial circuit of the State of Alabama, to be composed of the counties of Autauga, Chilton, Elmore and Montgomery," is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply for the passage of this law not having been given as provided by section 106 of the Constitution, such law is void and unconstitutional.—*State ex. rel. Atty. Gen. v. Sayre, as Judge*, 641.

COURTS—Continued.

8. *Judgment of Elmore circuit court; invalidity thereof.*—A judgment rendered in the circuit court of Elmore county, which is convened at a time fixed by an act creating the 15th judicial circuit, which act is unconstitutional and void, and at a time different from that fixed by law prior to the passage of said act, is void, and an appeal therefrom will be dismissed. *Kidd v. Burke*, 625.

II. CITY COURTS.

9. *Construction of act creating city court of Gadsden; rule of practice on appeal; trial by court without jury.*—Under the statute creating and establishing the city court of Gadsden (Acts 1900-01, p. 1298), providing that where a cause is tried by the court without a jury "either party may, by bill of exceptions, also present for review the conclusions and judgment of the court on the evidence," etc., the appellate court can not review the correctness of the conclusion and judgment of the court upon the evidence, unless it is disclosed in the bill of exceptions that an exception was reserved thereto.—*Fleming v. State*, 52.
10. *Jurisdiction of circuit and city courts; when judgment for less than limit of jurisdiction, suit should be dismissed.*—Where, in an action of assumpsit brought in the circuit or city court to recover \$100.00, the verdict and judgment are for \$13.00, and the amount claimed was not reduced by reason of a set-off successfully made by the defendant, said judgment, being below the minimum amount of the court's jurisdiction, should, upon motion made by defendant, be set aside and the suit dismissed, (Code, Sec. 3315.)—*Smith v. Allen*, 148.
11. *Trial without jury.*—Section 14 of the Acts of 1875-6 providing for the trial of causes by the City Court of Selma, without a jury, authorizes a review by the Supreme Court of the conclusion and judgment of the City Court of Selma upon the evidence, only when such conclusions and judgment are shown in the bill of exceptions and the bill of exceptions contain exceptions thereto.—*Morey v. Monk*, 175.
12. *Constitutional law; validity of act establishing inferior court of Besseher.*—A published notice that "a bill will be introduced in the next session of the legislature of the State of Alabama, to create and establish an inferior court in the city of Bessemer in precinct 33, Jefferson county, with both civil and criminal jurisdiction, as provided by sections 130 and 158, articles 7 of the Constitution of the State," does not state the substance of the local act passed by the legislature establishing an inferior court of Bessemer in lieu of all justices of the peace of precinct 33 (Local Acts, 1903, p. 482); and said act establishing the inferior court of Bessemer is therefore unconstitutional and void.—*Tillman v. Porter*, 372.

III. COUNTY COURTS.

13. *Constitutional law: act repealing the county court of Clay county unconstitutional.*—The act approved September 18th, 1903 the purpose of which was to repeal an act establishing the county court of Clay county of law and equity jurisprudence and several other acts relating to said county court (Local Acts 1903, p. 255), is unconstitutional and void, for the reason that the notice of intention to apply for the passage of such repealing act did not state the substance of the bill which was introduced and purporting to be passed by the legislature *Hooton v. Mellon*, 245.

COURTS.—*Continued.*

14. *Same; act to establish inferior civil court of Mobile county unconstitutional.*—The act of the Legislature of Alabama approved September 26th, 1903, entitled "An Act to establish an inferior civil court of Mobile county in lieu of Justices of the Peace for the City of Mobile," (Local Acts 1903, pp. 348-352), is unconstitutional and void, because the notice required by Section 106 of the Constitution to be given stated that the court proposed to be established should have jurisdiction to the extent of \$200.—*Alford v. Hicks*, 355.

III. PROBATE COURTS.

15. *Guardian and ward; jurisdiction of probate courts and of chancery courts.*—The jurisdiction of the probate courts and courts of chancery are concurrent in matters of guardianship, and the ward has an unqualified right of electing the forum in which he will seek a settlement of the guardianship.—*Matthews v. Mauldin*, 434.

CRIMINAL LAW.

I. ABANDONING FAMILY.

1. *Indictment for abandoning family; wife competent witness.*—The statute making the wife a competent witness against her husband under an indictment for abandoning his family (Acts 1903, p. 32), is not an *ex post facto* law within the meaning of the constitutional provision.—*Wester v. State*, 56.
2. *Indictment for abandoning family; admissibility of evidence.*—On a trial under an indictment for abandoning his family, it is not competent for the defendant to ask the witness whether or not he had taken liberties with his wife's person prior to the abandonment.—*Ib.*, 56.

II. ADULTERY.

1. *Indictment; insufficiency of charge of adultery.*—An indictment which charges that the defendant, "a man did live with * * * a woman, against the peace and dignity of the State of Alabama," charges no offense against the laws of this State.—*State v. Johns*, 61.

III. ASSAULT WITH INTENT TO MURDER.

1. *Assault with intent to murder; circumstances from which intent may be inferred.*—In a prosecution for assault with intent to murder, the intent may be inferred from the character of the assault, the want or use of a deadly weapon, and the presence or absence of excusing or palliating facts or circumstances.—*Brown v. State*, 287.
2. *Same; same; length of time that assaulted party is confined.*—The length of time that the assaulted party is confined as a result of the wound inflicted on him by the defendant is material to show as to whether or not there was an intent to kill, as the extent of the wound may shed light upon the subject and would be a proper consideration for the jury in determining the intent.—*Ib.*, 287.
3. *Drunkenness as proof of lack of intent.*—To prove specific intent, partial intoxication will not avail. The intoxication must be shown to be such that the defendant's "mental faculties, because of drunkenness, were so overcome and stupefied as to render him incapable of distinguishing between right and wrong."—*Ib.*, 287.

CRIMINAL LAW—Continued.

4. *Presumption of malice from use of deadly weapon.*—The law presumes malice from the use of a deadly weapon on making an assault unless the evidence in the case rebuts that presumption, and unless the evidence overcomes such presumption, such assault is in law a malicious assault.—*Ib.*, 287.
5. *Assault with intent to murder; if defendant, had death ensued, would only have been guilty of manslaughter in the first degree, he cannot be found guilty of.*—In a prosecution for assault with intent to murder, if the defendant, had death ensued, would only have been guilty of manslaughter in the first degree, he cannot be found guilty, where death did not ensue, of assault with intent to murder.—*Ib.*, 287.
6. *Same; same; charge must define what is manslaughter in the first degree.*—A charge to the jury that "if the jury believe from the evidence that if Cox had died it would only have been manslaughter, in the first degree, the jury cannot find defendant guilty of an assault with intent to murder" is properly refused, because it refers a question of law to the jury and leaves it to them to define what is manslaughter in the first degree.—*Ib.*, 287.
7. *Evidence; charge as to effect of.*—A charge to the jury that "if the jury believe that defendant had made friends with Cox in good faith and that Cox then began to abuse defendant about the butter and cursed defendant and struck him in the face and that defendant then inflamed by the blow suddenly cut Cox with his knife, you cannot convict him of assault with intent to murder" is properly refused.—*Ib.*, 287.
8. *Same; same.*—A charge that "if the jury believe from the evidence that Cox was following Brown over the yard and that Cox suddenly attacked him and struck him in the face and the jury believe that Brown suddenly inflamed by this blow cut Cox with a knife, defendant cannot be found guilty of an assault with intent to murder" is properly refused.—*Ib.*, 287.
9. *Assault with intent to murder; reasonable doubt as to specific intent; charge in relation thereto.*—A charge that "if the jury have a reasonable doubt growing out of the evidence whether defendant assaulted Grady Cox with the specific intent to kill him, you must acquit the defendant," is bad.—*Ib.*, 289.

IV. BAIL.

10. *Habeas Corpus; homicide; when bail properly denied.*—Where in a habeas corpus proceedings seeking bail under an indictment for murder, it is shown that the homicide was committed by the father of the petitioners in shooting a deputy sheriff while resisting arrest by that officer and others, and no justification for the killing is shown, and it is reasonably certain that had not the petitioners interfered, the killing would not have occurred, the fact that the petitioners' father was at the time of committing the homicide insane, does not relieve them from the responsibility for the killing, and it is not error for the court to refuse to permit the petitioners to prove the fact of their father's insanity.—*Johnson v. State*, 70.

V. CARRYING ON BUSINESS WITHOUT LICENSE.

11. *Constitutional law; engaging in business of emigrant agent without obtaining license.*—The act of the Legislature, approved October 1. 1903, "to prohibit emigrant agents from plying their vocation within the State without first obtaining

CRIMINAL LAW—Continued.

a license therefor," is not violative of the 14th amendment of the Constitution of the United States, or of section 31 of the Constitution of Alabama; and said act is, therefore, valid. *Kendrick v. State*, 43.

VI. CONFESSION.

12. *Same; predicate for confession; when sufficient*.—Where the officer who arrested the defendant testified that he made no threats against nor promises to the defendant nor offered him any inducements to make a statement, nor did others in his presence, he was properly permitted to state what the defendant told him about the killing.—*Smith v. State*, 14.
13. *Confessions are prima facie inadmissible; predicate must be established for the introduction thereof*.—All confessions are *prima facie* not admissible as evidence, and a predicate must be laid for the introduction of a statement by defendant as a confession.—*State v. Stallings*, 113.

VII. CORPUS DELICTI.

14. *Obtaining money under false pretenses; admissibility in evidence of confession; corpus delicti*.—On a trial under an indictment for obtaining money under false pretenses, in the absence of independent evidence as to the falsity of the representations made by defendant, a confession of the defendant to the effect that such representations were false, is not admissible; and it is error for the court to refuse to exclude such confession upon motion made by the defendant upon the ground that the *corpus delicti* had not been proved.—*Johnson v. State*, 1.
15. *Corpus delicti; when confession not sufficient to support conviction*.—A confession not corroborated by independent evidence of the *corpus delicti* is not sufficient to support a conviction of felony.—*Ib.* 1.

VIII. DRUNKENNESS.

16. *Drunkenness as proof of lack of intent*.—To prove specific intent, partial intoxication will not avail. The intoxication must be shown to be such that the defendant's "mental faculties, because of drunkenness, were so overcome and stupefied as to render him incapable of distinguishing between right and wrong."—*Brown v. State*, 287.

IX. EVIDENCE.

17. *Obtaining money under false pretenses; admissibility in evidence of confession; corpus delicti*.—On a trial under indictment for obtaining money under false pretenses, in the absence of independent evidence as to the falsity of the representations made by defendant, a confession of the defendant to the effect that such representations were false, is not admissible; and it is error for the court to refuse to exclude such confession upon motion made by the defendant upon the ground that the *corpus delicti* had not been proved.—*Johnson v. State*, 1.
18. *Corpus delicti; when confession not sufficient to support conviction*.—A confession not corroborated by independent evidence of the *corpus delicti* is not sufficient to support a conviction of felony.—*Ib.* 1.
19. *Robbery; conspiracy; admissibility of evidence*.—Where two persons are jointly indicted for robbery, and the evidence tends to show not only that each of them participated in the robbery, but there was a conspiracy between them to commit the offense, it is competent, on a separate trial of one of them, to

CRIMINAL LAW—*Continued.*

show what was said and done by the other defendant in furtherance of the common design, after the defendant who was being tried, had absented himself from the scene of the crime. *Toliver v. State*, 3.

- 20 *Same; admissibility of evidence.*—On a trial under an indictment charging two defendants with robbery, and where there is a severance, it is competent for the defendant on trial to show that some other person, and not himself, was with his co-defendant when the robbery was committed; but evidence as to the character of such other person in the community, is not admissible in evidence.—*Ib.*, 3.
21. *Same; evidence of drinking, when irrelevant.*—On a trial under an indictment for murder, evidence that deceased was a man who drank a good deal is properly excluded when offered before there was any evidence of self-defense, or any other issue which might have rendered the evidence relevant.—*Smith v. State*, 14.
22. *Same; cross examination of witness.*—In such case, where the State brought out on direct examination of a witness that the deceased was in a saloon shortly before the killing and was "drinking heavily," it was the right of the defendant on cross-examination to have the witness state the facts upon which the statement was predicated.—*Ib.*, 14.
23. *Same; immaterial testimony.*—In such case, whether the deceased was in the saloon on the day previous to the day on which he was killed, was immaterial to the issue.—*Ib.*, 14.
24. *Same; objection to question and answer.*—When an objection is made and sustained to a question propounded to a witness, but the record is silent as to the answer expected, this court cannot consider the correctness of the ruling.—*Ib.*, 14.
25. *Same; predicate for confession; when sufficient.*—Where the officer who arrested the defendant testified that he made no threats against nor promises to the defendant nor offered him any inducements to make a statement, nor did others in his presence, he was properly permitted to state what the defendant told him about the killing.—*Ib.*, 14.
26. *Same; same; when evidence of mob immaterial.*—Where the defendant sought to show that a mob was formed on the night of the killing to take him away from the officer who arrested him, and it does not appear that such fact existed prior to or contemporaneous with the making of a statement to the officer regarding the killing, the court properly sustained an objection to questions calling for such testimony.—*Ib.*, 14.
27. *Same; character for honesty not in issue.*—On a trial under an indictment for murder the defendant's character for honesty is not in issue.—*Ib.*, 14.
- 28 *Same; character of defendant's parents.*—In such case, the character of defendant's parents was not a subject of inquiry. *Ib.*, 14.
- 29 *Same; irrelevant testimony.*—In such case the fact that deceased claimed to have been robbed, had no tendency to prove that he was not a person who maintained a good character for peace and quietude.—*Ib.*, 14.
30. *Seduction; evidence, when admissible.*—On a trial under an indictment for seduction where there is evidence that the commission of the offense was procured by means of a promise of marriage, it is competent for the prosecutrix to testify that the defendant told her that he loved her.—*Weaver v. State*, 33.

CRIMINAL LAW—Continued.

31. *Same; immaterial testimony.*—In such a case it was not material whether the child of the prosecutrix was born and the promise made in the county where the prosecution was begun.—*Ib.*, 33.
32. *Same; when evidence admissible as bearing on promise of marriage.*—In such a case, the brother of the prosecutrix may testify that he heard the defendant tell the prosecutrix that he loved her, as such testimony tends to corroborate her on this point and was a circumstance which with others might authorize the jury to believe that he was leading her to believe that he was going to marry her.—*Ib.*, 33.
33. *Same; evidence of flight.*—In such a case, it may be shown that the defendant was not in the community where the prosecutrix lived, after the offense was committed, until brought back to answer the indictment, as tending to show that he realized his danger after learning of her condition.—*Ib.*, 33.
34. *Same; admissibility of letters from defendant to prosecutrix.*—In such a case, letters written by the defendant to the prosecutrix after the commission of the offense, and received by her through the usual channels, are admissible, as tending to show the relations that had existed between them.—*Ib.*, 33.
35. *Res gestae; what acts and declarations admissible as.*—Acts and declarations to be admissible as *res gestae*, must be substantially contemporaneous with the main fact and so closely connected with it as to illustrate his whole character.—*State v. Stallings*, 113.
36. *Same; same; case at bar.*—Evidence which is offered to prove that after defendant, who was seriously wounded, had been removed to a drug store, and about five minutes after the shooting upon being informed that the person he assailed was dead, he said, "I have done what I always intended to do, and am ready to die," is inadmissible as a part of the *res gestae*.—*Ib.*, 113.
37. *Confessions are prima facie inadmissible; predicate must be established for the introduction thereof.*—All confessions are *prima facie* not admissible as evidence, and a predicate must be laid for the introduction of a statement by defendant as a confession.—*Ib.*, 113.
38. *Indictment for abandoning family; admissibility of evidence.*—On a trial under an indictment for abandoning his family, it is not competent for the defendant to ask the witness whether or not he had taken liberties with his wife's person prior to the abandonment.—*Wester v. State*, 56.
39. *Charge as to degree of conviction with which jury should regard defendant's guilt in order to render verdict of guilty.*—A charge that "if, after considering all the evidence, you have a fixed conviction of the truth of the charge,—you are satisfied beyond a reasonable doubt—then it is your duty to convict the defendant," is correct.—*Brown v. State*, 289.
40. *Credibility of witnesses and weight given to the testimony, jury is judge of.*—A charge to the jury that "you are the sole judge as to the credibility of the witnesses and the weight that should be given to the testimony" is correct.—*Ib.*, 289.
41. *Evidence, charge as to effect of.*—A charge to the jury that "if the jury believe that defendant had made friends with Cox in good faith and that Cox then began to abuse defendant about the butter and cursed defendant and struck him in the face and that defendant then inflamed by the blow suddenly cut Cox with his knife, you cannot convict him of assault with intent to murder" is properly refused.—*Ib.*, 287.

CRIMINAL LAW—*Continued.*

42. *Same; same.*—A charge that "if the jury believe from the evidence that Cox was following Brown over the yard and that Cox suddenly attacked him and struck him in the face and that the jury believe that Brown suddenly inflamed by this blow cut Cox with a knife, defendant cannot be found guilty of an assault with intent to murder" is properly refused.—*Id.*, 287.
43. *Proof of good character of witness whose testimony had been impeached by evidence of contradictory statements, admissible.* Where a witness has been impeached by proof of contradictory statements, evidence of the good character of such witness is admissible.—*Id.*, 287.
44. *Conflict in evidence; introduction of contradictory statements.* In a prosecution for assault with intent to murder, where there is conflict in the evidence as to who was the aggressor, it is admissible, after laying predicate, to prove a contradictory statement of the prosecuting witness as to material facts. *Id.*, 287.

X. EXTRADITION.

45. *Extradition; habeas corpus; what can be shown on hearing.*—Where in compliance with a writ of extradition from the Governor of another State, a prisoner alleged to be a fugitive from justice in this State, is arrested under a warrant issued by the Governor, and upon such arrest seeks to be discharged from custody under a writ of *habeas corpus*, although the return to the writ of *habeas corpus* makes out a prima facie case, and the prisoner cannot require the court before whom the *habeas corpus* is heard to inquire into the merits of the crime charged, it is permissible for him to show that he is not a fugitive from justice, or that the process is void; and if the indictment or affidavit, which is the basis of the extradition charges no crime under the laws of the demanding State, he should be permitted to establish that fact.—*Barriere v. State*, 72.

XI. HABEAS CORPUS.

46. *Habeas Corpus; when convict not discharged by reason of detention.*—While a party who has been convicted and sentenced to hard labor for the county must not thereafter be detained by the sheriff for an unreasonable length of time; yet if the conviction was had on Sept. 19, the detention of the defendant so convicted until Oct. 4, is not a detention for such unreasonable length of time, as would authorize his discharge on writ of *habeas corpus*.—*Ex parte Bettis*, 68.
47. *Habeas Corpus; homicide; when bail properly denied.*—Where in a *habeas corpus* proceedings seeking bail under an indictment for murder, it is shown that the homicide was committed by the other of the petitioners in shooting a deputy sheriff while resisting arrest by that officer and others, and no justification for the killing is shown, and it is reasonably certain that had not the petitioners interfered, the killing would not have occurred, the fact that the petitioner's father was at the time of committing the homicide insane, does not relieve them from the responsibility or the killing, and it is not error or the court to refuse to permit the petitioners to prove the fact of their father's insanity.—*Johnson v. State*, 70.
48. *Extradition; habeas corpus; what can be shown on hearing.* where in compliance with a writ of extradition from the Governor of another State, a prisoner alleged to be a fugitive

CRIMINAL LAW—Continued.

from justice in this State, is arrested under a warrant issued by the Governor, and upon such arrest seeks to be discharged from custody under a writ of *habeas corpus* makes out a *caifec* from custody under a writ of *habeas corpus*, although the return to the writ of *habeas corpus* makes out a prima facie case, and the prisoner cannot require the court before whom the *habeas corpus* is heard to inquire into the merits of the crime charged, it is permissible for him to show that he is not a fugitive from justice, or that the process is void; and if the indictment or affidavit, which is the basis of the extradition charges no crime under the laws of the demanding State, he should be permitted to establish that fact.—*Barriere v. State*, 72.

XII. HOMICIDE.

49. *Homicide; evidence of drinking, when irrelevant.*—On a trial under an indictment for murder, evidence that deceased was a man who drank a good deal is properly excluded when offered before there was any evidence of self-defense, or any other issue which might have rendered the evidence relevant.—*Smith v. State*, 14.
50. *Indictment for murder; averment of means.*—An indictment which charges that the defendant unlawfully and with malice aforethought killed A. B. "by hitting him or striking him with a hatchet or with some blunt instrument to the grand jury unknown." etc., is sufficient and not subject to demurrer.—*Ib.*, 14.
51. *Habeas Corpus; homicide; when bail properly denied.*—Where in a habeas corpus proceedings seeking bail under an indictment for murder, it is shown that the homicide was committed by the father of the petitioners in shooting a deputy sheriff while resisting arrest by that officer and others, and no justification for the killing is shown, and it is reasonably certain that had not the petitioners interfered, the killing would not have occurred, the fact that the petitioners' father was at the time of committing the homicide insane, does not relieve them from the responsibility for the killing, and it is not error for the court to refuse to permit the petitioners to prove the fact of their father's insanity.—*Johnson v. State*, 70.

XIII. INDICTMENT.

52. *Indictment for obtaining money under false pretenses; Code form sufficient.*—An indictment for obtaining money under false pretenses which follows the form set out in the Code (Criminal Code, Sec. 4923, form 48) is sufficient and not subject to demurrer.—*Johnson v. State*, 1.
53. *Indictment for murder; averment of means.*—An indictment which charges that the defendant unlawfully and with malice aforethought killed A. B. "by hitting him or striking him with a hatchet or with some blunt instrument to the grand jury unknown." etc., is sufficient and not subject to demurrer.—*Smith v. State*, 14.
54. *Indictment; invalid when preferred by grand jury at a time not legally held.*—An indictment which is preferred by a grand jury organized at a term of the Circuit Court which is held at a time not authorized by law, is void, and will not support a judgment of conviction.—*Skinner v. State*, 46.
55. *Indictment for selling property covered by lien; code form sufficient.*—An indictment for selling personal property covered by a lien, which is in the form prescribed by the Code (Crim. Code, p. 335, form 78), is sufficient and not subject to demurrer.—*Tallent v. State*, 47.

CRIMINAL LAW—Continued.

56. *Indictment; insufficiency of charge of adultery.*—An indictment which charges that the defendant, "a man did live with * * * a woman, against the peace and dignity of the State of Alabama," charges no offense against the laws of this State.—*State v. Johns*, 61.

XIV. LARCENY.

57. *Larceny; crude turpentine subject of larceny.*—Crude turpentine which has run from the top of a pine tree into boxes which were cut into the tree to serve as receptacles for the turpentine, is, while in such boxes, the subject of larceny.—*Dickens v. State*, 49.
58. *Larceny of crude turpentine; when evil intent and felonious taking a question for the jury.*—On a trial under an indictment for the larceny of crude turpentine while in the boxes cut into the trees, where there was evidence tending to show that the defendant was dipping turpentine for a third party, and that he was not beyond the line of the property owned by such third party, and that the turpentine was taken from the boxes by the defendant in the day time, the question of evil intent and felonious taking which are ingredients of larceny, is a question for the jury, and the general affirmative charge requested by the defendant is properly refused.—*Id.* 49.

XV. JURY AND JURORS.

59. *Motion in arrest of judgment; when properly overruled.*—Irregularities in the formation of the jury are waived if not objected to before the trial is entered upon, and a motion in arrest of judgment because of such irregularities, is properly overruled.—*Weaver v. State*, 33.

XVI. LICENSE.

See CARRYING ON BUSINESS WITHOUT LICENSE.

XVII. MALICE.

60. *Presumption of malice from use of deadly weapon.*—The law presumes malice from the use of a deadly weapon on making an assault unless the evidence in the case rebuts that presumption, and unless the evidence overcomes such presumption, such assault is in law a malicious assault.—*Brown v. State*, 287.

See HOMICIDE.

XVIII. OBTAINING MONEY UNDER FALSE PRETENSES.

61. *Indictment for obtaining money under false pretenses; Code form sufficient.*—An indictment for obtaining money under false pretenses which follows the form set out in the Code (Criminal Code, Sec. 4923, form 48) is sufficient and not subject to demurrer.—*Johnson v. State*, 1.
62. *Obtaining money under false pretenses; admissibility in evidence of confession; corpus delicti.*—On a trial under an indictment for obtaining money under false pretenses, in the absence of independent evidence as to the falsity of the representations made by defendant, a confession of the defendant to the effect that such representations were false, is not admissible; and it is error for the court to refuse to exclude such confession upon motion made by the defendant upon the ground that the *corpus delicti* had not been proved.—*Id.*, 1.

CRIMINAL LAW—Continued.

XIX. PLEAS AND DEFENSES.

63. *Pleas in abatement may be filed after plea to merits, in discretion of lower court; when record shows filing.*—Where the defendant had pleaded to the merits the trial court in its discretion could permit the withdrawal of such plea and allow the filing of pleas in abatement, and, though the record does not in terms show that the court permitted the filing of such pleas, they were ordered to be filed and made a part of the record and the court sustained a demurrer thereto, the conclusion is that the court allowed the filing of the pleas and they will be considered by this court as having been filed.—*Smith v. State*, 14.
64. *Presence of stenographer in grand jury room; when authorized.* A plea in abatement setting up that there was present during the examination of the witnesses before the grand jury which found the indictment, a stenographer, duly sworn as such for the grand jury, and who was not a member thereof, is bad on demurrer, the act of December 10, 1900 (Acts 1900-01, p. 308) authorizing the employment of a stenographer to attend before the grand jury.—*Id.*, 14.
65. *Concurrence of grand jurors; when shown.*—Where the record shows that the grand jury which returned the indictment was composed of seventeen members, a plea in abatement, that one of the jurors was by reason of extreme deafness incompetent to hear the evidence, is bad on demurrer, since it does not appear that sixteen of the grand jurors did not hear the evidence and vote upon it to find the indictment.—*Id.*, 14.
66. *Indictment for murder; averment of means.*—An indictment which charges that the defendant unlawfully and with malice aforethought killed A. B. "by hitting him or striking him with a hatchet or with some blunt instrument to the grand jury unknown," etc., is sufficient and not subject to demurrer.—*Smith v. State*, 14.
67. *Pleading and practice; plea in abatement; effect of recital of judgment entry as to joinder of issue.*—Where a prosecution is commenced by an affidavit or complaint, and the record discloses that a plea in abatement was filed to the affidavit, but it does not show any disposition whatever of the plea, and the judgment entry affirmatively shows that issue was joined upon the plea of not guilty, a judgment of guilty against the defendant is not erroneous upon the ground that it fails to respond to the issue presented by the plea in abatement.—*Jackson v. State*, 55.
68. *Trial and its incidents; general request for charges by defendant; how reviewed on appeal.*—The recital in bill of exceptions that the defendant "asked the court to give the following charges in writing, to-wit:" followed by four charges numbered consecutively, does not show that the court was separately requested to give each of said charges; and the court cannot be put in error for refusing to give said charges unless there was error in refusing all of them.—*Yeats v. State*, 58.

XX. RES GESTAE.

69. *Res gestae; what acts and declarations admissible as.*—Acts and declarations to be admissible as *res gestae*, must be substantially contemporaneous with the main fact and so closely connected with it as to illustrate its character.—*State v. Stallings*, 113.
70. *Same: same; case at bar.*—Evidence which is offered to prove that after defendant, who was seriously wounded, had been removed to a drug store, and about five minutes after the

CRIMINAL LAW—Continued.

shooting upon being informed that the person he assailed was dead, he said, "I have done what I always intended to do, and am ready to die," is inadmissible as a part of the *res gestae*.—*Ib.*, 113.

XXI. REASONABLE DOUBT.

71. *Reasonable doubt; charge of court in reference thereto*.—On the trial of a criminal case, a charge is erroneous and properly refused which instructs the jury that "before the jury can convict the defendant, they must be satisfied to a moral certainty, not only that the proof is inconsistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant's guilt, that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty."—*Toliver v. State*, 3.
72. *Same; same; reasonable doubt*.—A charge that "a reasonable doubt is a doubt for which a reason can be given," is bad and properly refused.—*Smith v. State*, 14.
73. *Degree of doubt necessary to support acquittal; mere possible doubt insufficient*.—A charge to the jury that "the doubt which will justify an acquittal must be actual and substantial—not a mere possible doubt—because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt" is correct.—*Brown v. State*, 287.
74. *Possibility of innocence insufficient to justify acquittal*.—A charge to the jury that "if you believe from the evidence beyond a reasonable doubt that the defendant is guilty, though you also believe it possible he is not guilty, you must convict him," is correct.—*Ib.*, 289.
75. *Reasonable doubt as to any material fact insufficient to justify acquittal; charge to that effect*.—A charge that "if the jury have any reasonable doubt of any material fact in this case, they must acquit the defendant" is bad.—*Ib.*, 289.
76. *Assault with intent to murder; reasonable doubt as to specific intent; charge in relation thereto*.—A charge that "if the jury have a reasonable doubt growing out of the evidence whether defendant assaulted Grady Cox with the specific intent to kill him, you must acquit the defendant," is bad.—*Ib.*, 289.

XXII. ROBBERY.

77. *Robbery; conspiracy; admissibility of evidence*.—Where two persons are jointly indicted for robbery, and the evidence tends to show not only that each of them participated in the robbery, but there was a conspiracy between them to commit the offense, it is competent, on a separate trial of one of them, to show what was said and done by the other defendant in furtherance of the common design, after the defendant who was being tried, had absented himself from the scene of the crime.—*Tolliver v. State*, 3.
78. *Same; admissibility of evidence*.—On a trial under an indictment charging two defendants with robbery, and where there is a severance, it is competent for the defendant on trial to show that some other person, and not himself, was with his co-defendant when the robbery was committed; but evidence as to the character of such other person in the community, is not admissible in evidence.—*Ib.*, 3.

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79. *Seduction; evidence, when admissible.*—On a trial under an indictment for seduction where there is evidence that the commission of the offense was procured by means of a promise of marriage, it is competent for the prosecutrix to testify that the defendant told her that he loved her.—*Weaver v. State*, 33.
80. *Same; immaterial testimony.*—In such a case it was not material whether the child of the prosecutrix was born and the promise made in the county where the prosecution was begun.—*Ib.*, 33.
81. *Same; when evidence admissible as bearing on promise of marriage.*—In such a case, the brother of the prosecutrix may testify that he heard the defendant tell the prosecutrix that he loved her, as such testimony tends to corroborate her on this point and was a circumstance which with others might authorize the jury to believe that he was leading her to believe that he was going to marry her.—*Ib.*, 33.
82. *Same; evidence of flight.*—In such a case, it may be shown that the defendant was not in the community where the prosecutrix lived, after the offense was committed, until brought back to answer the indictment, as tending to show that he realized his danger after learning of her condition.—*Ib.*, 33.
83. *Same; admissibility of letters from defendant to prosecutrix.*—In such a case, letters written by the defendant to the prosecutrix after the commission of the offense, and received by her through the usual channels, are admissible, as tending to show the relations that had existed between them.—*Ib.*, 33.
84. *Same; argument of counsel.*—In such a case, remarks of the solicitor to the jury on the word "beast" used in a letter received by the prosecutrix from defendant, in the place of "best," that the defendant characterized himself by the use of the word "beast," are mere expressions of opinion, and unobjectionable.—*Ib.*, 33.
85. *Seduction; charge to jury.*—In such a case, where there is evidence that the prosecutrix yielded to the defendant as the result of a promise of marriage, a charge which instructs the jury that "if the evidence satisfies you beyond a reasonable doubt that Mollie Jenkins surrendered her virtue and had sexual intercourse with defendant as a result of a promise of marriage made to her by defendant, but that said promise was made by defendant and said Mollie Jenkins surrendered her virtue in 1898, then your verdict must be for the defendant," is properly refused as she may have surrendered her virtue in 1898 and yet if she yielded to him in 1901 she would be entitled to the protection of the statute.—*Weaver v. State*, 33.
86. *Same; same; chastity of prosecutrix.*—In such a case a charge is erroneous which instructs the jury to find the defendant not guilty if he had intercourse with the prosecutrix prior to the time mentioned by her, as she may have been mistaken in the exact date and if she had previously fallen she may have reformed and if she then yielded to him under promise of marriage she would be entitled to the protection of the statute.—*Ib.*, 33.
87. *Same; same; same.*—In such a case, a charge is erroneous which instructs the jury that they could infer the unchastity of the prosecutrix because the State did not produce testimony as to her character.—*Ib.*, 33.
88. *Same; same; corroboration of prosecutrix.*—In such a case, where there was evidence that defendant was overheard to tell the prosecutrix that he loved her, that he visited her frequently for several years, that after the commission of the

CRIMINAL LAW—*Continued.*

- offence he left the community, that he wrote letters to her containing acknowledgments of his relations with her and of his promise of marriage, the jury might have found that the prosecutrix was corroborated within the requirements of the statute, and a charge instructing the jury to acquit the defendant for want of such corroboration, is properly refused.—*Id.*, 33.
89. *Same; same.*—In such a case a charge is properly refused which instructs the jury to acquit the defendant unless the prosecutrix yielded on account of a promise of marriage where the jury might have found that she yielded as the result of "arts" or "flattery."—*Id.*, 33.
90. *Same; same; corroboration of prosecutrix.*—In such a case it is not necessary for the prosecutrix to be corroborated by other testimony as to the promise of marriage and it is sufficient if she is corroborated as to either of the material facts so as to satisfy the jury that she was worthy of credit.—*Id.*, 33.
91. *Same; same; willingness of prosecutrix.*—In such a case, a charge is properly refused which instructs the jury to find the defendant not guilty if the prosecutrix was willing to commit the offence, since such willingness may have been the result of his arts or flattery.—*Id.*, 33.

XXIV. SELF-DEFENSE.

92. *Same; same; freedom from fault.*—Charges to the jury under an indictment for murder to acquit the defendant under his plea of self-defense if he was reasonably without fault in bringing on the difficulty, are properly refused.—*Smith v. State*, 14.
93. *Same; same; constituents of self-defense.*—A charge to the jury under an indictment for murder which fails to set forth the constituents of self-defense, is properly refused.—*Id.*, 14.

XXV. SELLING PROPERTY ON WHICH THERE IS A LIEN.

94. *Indictment for selling property covered by lien; Code form sufficient.*—An indictment for selling personal property covered by a lien, which is in the form prescribed by the Code (Crim. Code, p. 335, form 78), is sufficient and not subject to demurrer.—*Tallent v. State*, 47.

XXVI. TRIAL AND ITS INCIDENTS.

95. *Trial and its incidents; when judgment of conviction void.* Where the trial of a criminal case is had at a time not authorized by law for the holding of the circuit court trying said case, the judgment of conviction rendered in such case is void, and will not support an appeal.—*Walker v. State*, 1.
96. *Same; right of defendant to have depositions and showings taken out by the jury.*—Under Code, sections 1834 and 5292, it is not a matter of right on the part of the defendant to have the jury take written depositions with them for use in their deliberations; and where the court sustained objections to certain portions of the showings and depositions of defendant's witnesses, and the portions which were not ruled out were read to the jury, the court properly refused to permit the jury to carry the showings and depositions out with them.—*Smith v. State*, 14.
97. *Motion in arrest of judgment; when properly overruled.*—Irregularities in the formation of the jury are waived if not objected to before the trial is entered upon, and a motion in ar-

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rest of judgment because of such irregularities, is properly overruled.—*Weaver v. State*, 33.

98. *Trial and its incidents; general request for charges by defendant; how reviewed on appeal.*—The recital in bill of exceptions that the defendant "asked the court to give the following charges in writing, to-wit:" followed by four charges numbered consecutively, does not show that the court was separately requested to give each of said charges; and the court cannot be put in error for refusing to give said charges unless there was error in refusing all of them.—*Yeats v. State*, 58.

XXVII. VERDICT, JUDGMENT AND SENTENCE.

99. *Trial and its incidents; when judgment of conviction void.*—Where the trial of a criminal case is had at a time not authorized, by law for the holding of the circuit court trying said case, the judgment of conviction rendered in such case is void, and will not support an appeal.—*Walker v. State*, 7.
100. *Same; same; conviction of manslaughter under indictment for murder.*—Under an indictment in the Code form (Code Section 4923, No. 63) the defendant may be convicted of manslaughter, and a charge to the jury to acquit the defendant if there is no proof of any material allegation of murder, is properly refused.—*Smith v. State*, 14.
101. *Judgment of conviction; void when rendered on day court not authorized to sit.*—The judgment of conviction in a criminal case which is rendered upon a day when the court is not legally in session, and at a term when the court is not authorized to sit, is void, and an appeal from such judgment will be dismissed.—*Walker v. State*, 32.
102. *Motion in arrest of judgment; when properly overruled.*—Irregularities in the formation of the jury are waived if not objected to before the trial is entered upon, and a motion in arrest of judgment because of such irregularities, is promptly overruled.—*Weaver v. State*, 33.
103. *Appeal from void judgment; should be dismissed.*—Judgment rendered by a court which is held at a time and place unauthorized by law, is void and appeal therefrom will be dismissed.—*White v. State*, 42.
104. *Pleading and practice; plea in abatement; effect of recital of judgment entry as to joinder of issue.*—Where a prosecution is commenced by an affidavit or complaint, and the record discloses that a plea in abatement was filed to the affidavit, but it does not show any disposition whatever of the plea, and the judgment entry affirmatively shows that issue was joined upon the plea of not guilty, a judgment of guilty against the defendant is not erroneous upon the ground that it fails to respond to the issue presented by the plea in abatement.—*Jackson v. State*, 55.

DAMAGES.

- 1 *Damages; wantonness or wilfulness.*—In an action for damages charging defendant with wanton or wilful wrong, the question of wantonness or wilfulness *vel non* is properly left to the jury.—*Montgomery St. Ry. v. Rice*, 674.

DECEDENTS' ESTATES.

See ESTATES.

DEEDS.

1. *Corporation; relation of director and officer; when deed set aside.*—Where a director and officer of a corporation, in disregard and breach of his fiduciary relation, secures the corporate authorities to convey to him property of the corporation, such transaction is voidable, and the corporation can maintain a bill in its own name to have the deed conveying the property set aside and annulled.—*Mobile Land & Imp. Co. v. Gass*, 520.
2. *Same; same; same.*—Where one who is a director and secretary and treasurer of a corporation, at a meeting of the directors of said corporation in which it was necessary for such person to participate to constitute a quorum, induces said meeting to authorize a conveyance of the corporate property to him, and his vote secured the passage of said resolution, the subsequent conveyance of the property by the corporate authorities in accordance with said resolution can be set aside and annulled by a bill being filed in equity for such purpose by the corporation itself.—*Ib.*, 520.
3. *Color of title; may be shown by void deed; exception.*—While as a general rule, a void deed is admissible in evidence to show color of title to the person claiming thereunder, if, however, the deed offered is void because of the uncertain and indefinite description of the land conveyed, such a deed would not convey color of title, and possession under it would be limited to *possessio pedis*.—*Brannan v. Henry*, 698.
4. *Deed; description of lands conveyed; latent ambiguity.*—Where the description of lands in a deed is by Government numbers, but the township and range are not described as being south or north, or east or west, and in the county where the land is described as being situated there are townships north and south bearing the same number as that designated in the deed in which there is the same section as that designated in the deed, such description standing alone would constitute a patent ambiguity, which could not be relieved by parol testimony of what was intended by the parties to be conveyed; but where in such deed there is a recital that the lands described therein were sold for the payment of taxes that were due from one M. D. M., the owner of said lands, such recital makes the description set forth in the deed a latent ambiguity and authorizes resort to competent parol evidence in aid of the description set forth in the deed.—*Ib.* 698.

DEMURRAGE.

1. *Railroad company's demurrage charges for detention of car; lien exists for such charges.*—A railroad company may legally charge car service or demurrage for the detention of its cars by a consignee or consignor beyond a reasonable time in which to unload them or load them, as fixed by rules adopted by the Alabama Car Service Association; and for such demurrage charges the carrier has a lien on the property shipped.—*Sou. Ry. Co. v. Lockwood Mfg. Co.*, 322.
2. *Same; lien not lost by placing car on particular track to be unloaded.* The placing of a loaded car on a particular track by a railroad company for the purpose of allowing the consignee to unload it, is not such an absolute and unconditional delivery unto the assignee of the articles shipped as would cut off or release company's future right of lien on said articles for legitimate charges for car service or demurrage that might subsequently accrue, by reason of the consignee's failure to unload the car within the time fixed by the rules of the company or of the car service association.—*Ib.* 322.

DEPOSITIONS AND SHOWINGS.

1. *Same; right of defendant to have depositions and showings taken out by the jury.*—Under Code. sections 1834 and 5292, it is not a matter of right on the part of the defendant to have the jury take written depositions with them for use in their deliberation and where the court sustained objections to certain portions of the showings and depositions of defendant's witnesses, and the portions which were not ruled out were read to the jury, the court properly refused to permit the jury to carry the showings and depositions out with them.—*Smith v. State*, 14.
2. *Petition for sale of lands for division; when depositions of witnesses should be suppressed.*—In a proceeding to sell lands owned jointly for division among the co-tenants, upon the ground that the same cannot be equitably divided, where there is no notice of the filing of interrogatories given as required by the statute' (Code § § 732, 733, 3181) the depositions taken upon such interrogatories should be suppressed.—*Edwards v. Edwards*, 268.
3. *Admitted showings as to evidence of absent witnesses; effect when such showing is not introduced and the witness appears and testified contrary to the showing.*—The rule that an attempt by a party to make the false appear true is a circumstance which the jury may consider to the disadvantage of the party so doing, does not apply where a showing is admitted, but is not introduced by the party in whose favor it is made, and the witness subsequently appears and testifies contrary to the showing.—*Brown v. State*, 289.
4. *Same; introduction of witness, for whom a showing in behalf of the defense has been made, by the State.*—A showing as to a witness of the defense which has been admitted by the State but not introduced by the defense and which, on the appearance of the witness during the trial, is introduced by the State, and the State cannot contradict same by the introduction of the witness to prove the falsity of the showing.—*Ib.* 287.

DIVORCE

See HUSBAND AND WIFE.

DISCOVERY.

1. *Bill for discovery; sufficiency of averment.*—A bill filed by simple contract creditors against their debtors for discovery of assets under the statute (Code, § 819), which avers that the defendants are indebted to the complainants in certain various amounts, that the defendants have no visible means subject to legal process of value sufficient to pay the claims of complainants; that the defendants have no property standing in their own name or in the name of the partnership of which they are members, which can be reached or subjected to legal process for the satisfaction of the claims of complainants, but that defendants have property, real or personal, or money or effects or choses in action, or have an interest in real or personal property, money, effects or choses in action, which are, and should be subject to the payment of complainants' claim, but the kind and description of the property and how the same is held are kept concealed and hidden by defendants, and are unknown to complainants, and that a discovery is necessary to enable complainants to reach and subject the property to their respective claims, is sufficient in its averments to authorize the maintenance of such bill; and is not subject to demurrer upon the ground that it is not shown by

DISCOVERY—*Continued.*

- such averments that the property sought to be discovered would not be exempt from the payment of complainants' claims.—*Kinney v. Reeves*, 604.
2. *Bill for discovery; sufficiency of affidavit.*—Where a bill is filed by creditors against a common debtor seeking a discovery of assets of the defendant, and it is averred in the bill that each of the complainants is a non-resident of the State, the verification of such bill by the affidavit of one of the complainants' counsel in which the affiant states that the complainants were absent from the State, shows a sufficient reason why the verification was made by one of the counsel for the complainants, (Rule 15 of Chancery Practice, Code, p. 1205.)—*Id.*, 604.
 3. *Same; same.*—Where the averments of the bill for discovery are positive and are not made upon information and belief, the verification of such bill by an affidavit made by one of complainants' counsel, which states that the complainants are absent from the State, and that the statements contained in the bill of complaint are true, is sufficient.—*Id.*, 604.

DISPENSARY.

1. *Constitutional law; act establishing dispensaries not invalid as granting exclusive privileges of selling intoxicating liquors by towns and cities in Walker County.*—The act of the Legislature authorizing all incorporated towns and cities in Walker County to establish and operate dispensaries, is not violative of Section 22 of the Constitution in that it grants to towns and cities of Walker County the exclusive privilege of selling intoxicating liquors.—*Childers v. Shepherd*, 385.
2. *Same; validity of act authorizing establishment of dispensaries in towns and cities in Walker County.*—The act of the Legislature "Authorizing incorporated towns and cities in Walker County to establish and operate dispensaries," etc., is not unconstitutional and void, because it authorized the people of Walker County by their votes to ratify the provisions of said act repealing all existing laws on the subject of selling intoxicating liquors in said county which might be in conflict with said act.—*Id.*, 385.
3. *Constitutional law; repeal of dispensary act as to Coffee County and prohibiting the sale of liquors in said county.*—A notice that application will be made to the Legislature "for the repeal of the law authorizing the establishment of dispensaries, so far as the said law relates to the county of Coffee, and forbids the commissioner's court of the county of Coffee from erecting dispensaries for said county," or a notice that application will be made to repeal "an act to authorize the municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors approved Feb. 18th, 1899, in so far as the same applies to the county of Coffee," does not set forth the substance of the act approved Sept. 25th, 1903, entitled "An act to repeal an act entitled an act to authorize municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate or prohibit the sale of such liquors, approved on the 18th day of Feb. 1899, in so far as the said act relates to the county of Coffee, and to prohibit the sale or giving away of such liquors in the county of Coffee, after the first Monday in January, 1904," (Local Acts, 1903, p. 316); and said last named act being a local act, is unconstitutional and void, as being offensive to Section 106 of the Constitution.—*Town of Elba v. Rhodes*, 689.

DISPENSARY—*Continued.*

4. *Same; act establishing dispensaries in the town of Elba unconstitutional.*—The act approved Oct. 1st, 1903, entitled "An act to establish and regulate a dispensary in the town of Elba, Coffee County, Alabama, for the sale of spirituous, vinous and malt liquors, and to establish and perpetuate board of commissioners for the management of said dispensary." (Local Acts, 1903, p. 443), is unconstitutional and void, in that by its terms said act grants an exclusive right to the commissioners provided for therein as individuals, and their successors, to establish and maintain a dispensary, and thereby traffic in liquor, etc., in the town of Elba, and is therefore in violation of the organic law prohibiting monopolies.—*Ib.*, 689.

DURESS.

1. *Marriage; jurisdiction of chancery court to annul marriage contract; duress.*—Where a party is by duress coerced into entering into marriage and the marriage ceremony is had under the supposed authorization of a marriage license, which license was invalid, and there has never been any co-habitation of the parties as man and wife after the ceremony, the person so coerced to enter into such marriage can maintain a bill to have annulled and declared void such pretended marriage. *Hawkins v. Hawkins*, 571.
2. *Execution of written instrument; what constitutes duress rendering instrument voidable.*—It is not the threat of a criminal prosecution in any case that constitutes duress which is deemed sufficient to avoid contracts, or to render invalid the execution of a written instrument, but the threat of criminal prosecution must be of such a nature and made under such circumstances as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the acts sought to be voided must be performed by said person while in said condition.—*Langley v. Andrews*, 665.
3. *Same; duress; ratification.*—A contract made under duress is only voidable and, therefore, the party upon whom duress has been imposed subsequently recognizes the validity of the contract involved, either by making payments thereon or otherwise. he will be held to have elected to waive the duress and ratify the contract.—*Ib.* 665.

ELECTIONS.

1. *Term of office of Judge of Probate not effected by the General Election Law of 1903.*—The "Act to further regulate elections in the State of Alabama," approved October 9, 1903, (Acts 1903, p. 438), did, not extend the terms of office of the Probate Judges then in office for an additional year; and under the provisions of said Act a Judge of Probate whose term of office commenced November 3, 1898, could not hold said office longer than a reasonable time after the expiration of his term of November 3, 1904, and until his successor was elected on November 8, 1904, could qualify.—*Prowell v. State ex fel. Hasty*, 80.

ELECTRIC LIGHT COMPANIES.

1. *Electric light companies; no exclusive right in the streets of a city.*—It is not within the power of a municipal corporation to grant any exclusive privilege in its streets to another corporation, so as to deprive itself of the right to revoke the same and grant like privileges to another corporation.—*Montg. L. & W. P. Co. v. Citizens L., H. & P. Co.*, 462.

ELECTRIC LIGHT COMPANIES—*Continued.*

2. *Same; same.*—Where a municipality has granted to a corporation the right to use its streets for a public utility, it has the right to grant like privileges to another corporation and to provide such restrictions and regulations as are necessary to prevent injury to the property of the first occupant and to prevent an interference with the discharge of its duties assumed to the public, and where such interference involves danger to the public, the courts will prevent it even without an ordinance upon bill properly filed.—*Ib.*, 462.
3. *Municipal corporations; when resolution not of a permanent character.*—An ordinance passed by the city council of a municipality, granting permission to an electric light company to maintain for a period of twenty days its line of wire, as then strung along a certain designated street in said city, and to make all necessary connections therewith, and which provide that the same should not become effective unless officials of the company obligate themselves "at the expiration of twenty days to replace said wires in accordance with such ordinance and regulations of the city code as may then be in force," is not a resolution of a permanent character within the meaning of an ordinance of said city which requires the vote of the majority of the members of the city council to adopt a resolution or ordinance of permanent operation.—*Ib.*, 462.
4. *Electric light companies; rights of competing companies to use all streets.*—Where an electric light company has by an ordinance of a city been granted the right to erect its poles and string its wire along the street of said city, it has no special rights in the streets of said city except as granted by the municipal authorities, and such company does not acquire rights over any distinct or separate part of the street, such as the right of way of a railroad company over which another company cannot pass without instituting condemnation proceedings, but the rights of the first electric light company who occupies the street of said city are subject to the rights of any other electric light company to which the city may grant the right to string its wires over the street, subject only to the right of the first company to be protected from injury by the stringing of other wires so near as to injure its property or prevent the discharge of its duties to the public.—*Ib.*, 462.

EJECTMENT.

1. *Ejectment; what necessary for plaintiff to recover when title based on sheriff's deed.*—In an action of ejectment where the plaintiff bases his right of recovery upon a sheriff's deed made after a sale under an execution, it is necessary in order for the plaintiff to recover, for him to show that there was a valid judgment, execution, levy, sale and deed, and that the defendant, in the judgment to whose title plaintiff succeeded, had an estate or interest in the lands which was subject to levy and sale.—*Carter v. Smith*, 414.
2. *Judgment; amendment nunc pro tunc.*—Where a judgment is amended nunc pro tunc, an execution issued upon said judgment properly recites the date of the original judgment as the date of the rendition of the judgment on which it was issued; and such an execution is admissible in evidence in an action of ejectment by the purchaser at a sale under said execution to recover the lands so sold.—*Ib.*, 414.

EJECTMENT—Continued.

3. *Ejectment; purchaser of equity of redemption.*—The purchaser of the equity of redemption at a sheriff's sale can maintain ejectment against the mortgagor, and the mortgagor is not allowed to set up an outstanding title in the mortgage to defeat such action; but such purchaser cannot maintain an action of ejectment against the mortgagee.—*Ib.*, 414.
4. *Action of ejectment; admissibility of evidence.*—In an action of ejectment brought by the purchaser at a sheriff's sale against one who claims under a mortgage, it is competent for the defendant to show that whatever title the defendant in execution owned, it passed from him before the levy and sale under the execution to plaintiff, and this is true, although the mortgage was assigned after the suit was commenced, in which the judgment was recovered upon which execution issued.—*Ib.*, 414.
5. *Ejectment; what necessary for plaintiff to recover; relevancy of deed to third party.*—In an action of ejectment, in order for the plaintiff to recover he must show that he had title at the commencement of the suit, and on to the time of the trial; and therefore a deed executed by the plaintiff prior to the institution of the suit, conveying the land to a third party, which deed was regularly acknowledged, and recorded, is not subject to be excluded from evidence upon the ground that it was irrelevant.—*Rottenbery v. Brown*, 630.
6. *Ejectment; admissibility of evidence.*—In an action of ejectment, where the defendant sets up the defense of adverse possession of 10 years, it is competent for the defendant as a witness in his own behalf to testify that he purchased the lands described in the complaint from the State and paid a certain sum of money therefor, and that he immediately went into thereof ever since said purchase.—*Brannan v. Henry*, 698.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

ERROR.

See APPEALS AND ERROR.

ESTATES.

1. *Enforcement of express trust; when laches not shown to exist; decedent's estate.*—A testator who left surviving him a wife and a minor child 11 years old, provided in his will that after a specific allowance to the wife, the balance of his estate should be divided equally between his wife and child, and also provided in the will that his wife should have the care, maintenance and education of his child and for that purpose he gave to the wife the control and management of all the moneys of his child under his will. The child was kept in ignorance of the provisions of her father's will, and knew nothing of the creation of the trust for her benefit. At different times the wife of the testator admitted her obligations to the child. The wife of the testator induced the child to go and live in a distant State with her aunts, and at no time did the wife make any provisions or give any moneys to the child or her aunts for her benefit. 37 years after the probate of the will of the testator, the wife died, leaving a substantial estate, and left a will which was invalid because not witnessed. By this will she bequeathed \$1500 to said child as "her rightful portion." After the death of the wife, the child, upon investigation, discovered for the first time the provisions of her father's will, and then a few months after the ascertainment of the

ESTATES—*Continued.*

facts filed a bill in chancery for the establishment and enforcement of the trust created by her father's will for her benefit and for an accounting. *Held*: that there was by the father's will created a trust for the benefit of the child, and the surviving wife was the trustee, and that by reason of the child having been kept in ignorance of her rights, she was not guilty of laches which would deprive her from seeking in a court of equity the establishment and enforcement of the express trust in her behalf as against the estate of the deceased wife.—*Mullen v. Walton*, 166.

2. *Filing of claim against insolvent estate; applies to judgments against intestate and not to judgments against administrator.* The requirement of section 306 of the Code, that all claims against an estate which has been declared insolvent must be filed within six months from the declaration of insolvency applies to judgments rendered before such decree of insolvency against the intestate, and not to those judgments rendered against the administrator.—*Woodal v. Wright*, 205.
3. *Declaration of insolvency as defense by administrator's sureties against judgment rendered previously to such declaration.* (*Acts* 1898-99, p. 85).—In an action against an administrator's bondsmen to recover a judgment against such administrator, a plea relying on the fact that the intestate's estate had been declared insolvent, since the rendition of such judgment, presents an immaterial issue.—*Id.*, 205.
4. *Judgment against administrator; bondsmen not estopped thereby from denying want of assets.*—The sureties on an administrator's bond are not estopped by a judgment against such administrator, in action against them to recover the amount of such judgment, from denying that the administrator had come into the possession of assets with which to discharge the indebtedness.—*Id.*, 205.
5. *Same; same; defective plea.*—A plea by his bondsmen which avers only that sufficient assets did not come into the possession of the administrator to pay the judgment against him, is defective.—*Id.*, 205.
6. *Decedent's estate; rights of minors.*—Where a married man at the time of his death owns other lands in this State than his homestead, and his estate has never been decreed insolvent, the rights of use and occupancy of the homestead, and the perception of rents, incomes and profits therefrom, during the life of the widow or the minority of child or children, whichever might last terminate, vest in the widow and minor children; but they take no title to the land, and in the event one of said minor children dies, said child has no title in the land which can be sold after its death pending the minority of any of the other children.—*Hosea v. Davis*, 211.

EXECUTORS OF WRITTEN INSTRUMENTS.

1. *Execution of written instrument by making mortgage; not invalid when attesting witness, agent or employee or mortgagee.*—Where in the execution of a mortgage, the mortgagor signs the same by making his mark, the fact that the attesting witness was an agent or employee of the mortgagee, does not render the mortgage invalid.—*Morris v. Bank of Attalla*, 638.
2. *Execution of written instrument; what constitutes duress rendering instrument voidable.*—It is not the threat of a criminal prosecution in any case that constitutes duress which is deemed sufficient to avoid contracts, or to render invalid the execution of a written instrument, but the threat of criminal

EXECUTION OF WRITTEN INSTRUMENTS—Continued.

prosecution must be of such a nature and made under such circumstances as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the acts sought to be voided must be performed by said person while in said condition.—*Langley v. Andrews*, 665.

3. *Same; duress; ratification.*—A contract made under duress is only voidable and, therefore, the party upon whom duress has been imposed subsequently recognizes the validity of the contract involved, either by making payments thereon or otherwise, he will be held to have elected to waive the duress and ratify the contract.—*Ib.* 665.

EXECUTORS AND ADMINISTRATORS.

- 1 *Filing of claim against insolvent estate; applies to judgments against intestate and not to judgments against administrator.* The requirement of section 306 of the Code, that all claims against an intestate which has been declared insolvent must be filed within six months from the declaration of insolvency applies to judgments rendered before such decree of insolvency against the intestate, and not to those judgments rendered against the administrator.—*Woodall v. Wright*, 205.
2. *Declaration of insolvency as defense by administrator's sureties against judgment rendered previously to such declaration, (Acts 1898-99, p. 85.).*—In an action against an administrators bondsman to recover a judgment against such administrator, a plea relying on the fact that the intestate's estate had been declared insolvent, since the rendition of such judgment, presents an immaterial issue.—*Ib.* 205.
- 3 *Judgment against administrator; bondsmen not estopped thereby from denying want of assets.*—The sureties on an administrator's bond are not estopped by a judgment against such administrator, in action against them to recover the amount of such judgment, from denying that the administrator had come into the possession of assets with which to discharge the indebtedness.—*Ib.* 205.
4. *Same; same; defective plea.*—A plea by his bondsmen which avers only that sufficient assets did not come into the possession of the administrator to pay the judgment against him, is defective.—*Ib.* 205.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Action against railroad company for killing dog; evidence as to what plaintiff was offered for dog inadmissible.*—In an action against a railroad company to recover damages for the alleged killing of a dog, it is error for the court to allow the plaintiff to testify that a year or two before the dog was killed, he was offered \$100.00 for it.—*Southern Ry. v. Parnell*, 146.
2. *Motion for new trial; evidence of jurors.*—Where on a motion for a new trial, the verdict rendered is impugned as being a quotient verdict, it is competent for the plaintiff in whose favor the verdict was returned to prove by the jurors themselves in support of their said verdict that it was not arrived at by a process which constituted it a quotient or illegal verdict.—*Birmingham Ry., L. & P. Co. v. Clemons*, 160.
3. *Construction and interpretation of laws of benefit order by its officers; not binding on courts or members of order.*—The decisions of a benefit order, or of its officers, has no binding effect on the members or their beneficiaries, and the construc-

EVIDENCE—*Continued.*

- tion given to any of the provisions of a contract of insurance by the officers of the society is not binding on the courts, and the members are not bound by any acts, which may have been done by them under such a construction. Evidence showing such decisions and interpretations is properly excluded.—*Money v. Monk*, 175.
4. *Evidence; when that relating to family relations and surroundings of intestate is admissible.*—Where an issue in a case is whether or not defendant was a member of intestate's family, evidence relating to the family relations and surroundings, the exercise of dominion and control by the intestate over the household, of which defendant was one, and the ownership of the house in which they resided as one and the same family, is pertinent to show that defendant was a member of intestate's family and that intestate was the head thereof, and is properly admissible.—*Ib.* 175.
 5. *Defendant may show his right and title to thing in controversy.* While, as a rule, the plaintiff has to rely on the strength of his title to the thing in controversy, this doctrine does not preclude the defendant from showing a right and title thereto.—*Ib.* 175.
 6. *Same; case at bar.*—In an action by the heirs at law of an intestate to recover from the intestate's step-son, who has been named as beneficiary in a benefit certificate, the proceeds of such certificate, the application of membership of intestate, the benefit certificate to intestate's wife, who was also defendant's mother, the surrender after her death, the benefit certificate of defendant, the payment of assessments by the insured and the proof of his death, relate to the history of the insurance contract and to the defendant's right and title thereunder, and are properly admissible in evidence.—*Ib.* 175.
 7. *Action by passenger against street railway; evidence of number of passengers on car, when admissible.*—In an action by a passenger against a street railway a count in a complaint which ascribed plaintiff's injuries to the "wanton and reckless negligence" of defendant's employees in charge of the car on which plaintiff was a passenger, in that they caused the car to approach and cross a railroad track without stopping, knowing that a train was approaching on such track and that it would probably cross defendant's track without stopping and that there would be a collision between the train and the car and that the probable result of the collision would be injury to the passengers on the car, evidence that the street car was at the time crowded with passengers, was pertinent as supporting the alleged probability and the employer's appreciation of it that passengers would be injured by the collision.—*Birmingham Ry., L. & P. Co. v. Rutledge*, 195.
 8. *Same; when complaints of pain by injured passenger admissible.* In an action by a passenger against a street railway for injuries caused by a collision between the car on which plaintiff was riding, and a railroad train, complaints of pain and suffering on the part of the injured passenger, made at the time the injuries were received, may be adduced as original evidence.—*Ib.* 195.
 9. *Same; same; case at bar.*—In such a case it is competent for a physician to testify that plaintiff told him that he was hurt internally and that he had pains in his hips and was nervous.
 10. *Same; plaintiff may walk before jury.*—In such a case where the evidence tended to show that the plaintiff was injured in the back and legs as a result of the collision so as to affect his

EVIDENCE—*Continued.*

- ability to walk, he may be allowed to "walk the best he can" before the jury.—*Ib.* 195.
11. *Same; evidence of injuries to sexual organs.*—In such a case where the evidence tended to show that the plaintiff received injuries which affected his sexual organs, he may testify that he "thinks such organs are no good" to him.—*Ib.* 195.
 12. *Same; examination of witness.*—Where an objection is sustained to a question propounded a witness and such question is afterwards answered, there is no error of which the excepting party can complain.—*Ib.* 195.
 13. *Same; cross-examination of witness.*—Where a physician, witness for defendant, testified that he was sent by the defendant to see plaintiff after his injury, the plaintiff may bring out on cross-examination what the defendant's attorney said to him, as tending to show a bias unfavorable to defendant.—*Ib.* 195.
 14. *Same; examination of witness.*—Where a witness was asked to state at what rate of speed the car approached the railroad crossing, his answer that "it would be hard to judge that, because it had just started and it could not have been running fast," was properly excluded, as being the witness' conclusion.—*Ib.* 195.
 15. *Charge; what erroneous.*—In a suit by a passenger against a carrier for failure to carry her to her destination, when the undisputed testimony shows that she left the car in which she was riding, and went into another car, which was left on a side track at an intermediate station with her in it, and the plaintiff's testimony tends to show that both the conductor and flagman of the train on which she was riding instructed her to make the change, and the flagman testifies that he gave the plaintiff no such instructions, and had nothing to do with her changing cars, and the conductor is not examined, being dead, it is error to instruct the jury that "Unless they are reasonably satisfied that the conductor *and* flagman told plaintiff to get in the wrong car, and thus was left, then they must return a verdict for the defendant."—*Robertson v. L. & N. R. R. Co.*, 216.
 16. *Evidence; what improper.*—In such a case, the plaintiff cannot testify, whether any one was left except herself, or who was her companion on the trip, or whether such companion changed cars in the same manner as she did.—*Ib.*, 216.
 17. *Same.*—Nor, in such a case, can the plaintiff testify that a night watchman and a section foreman of defendant, who had nothing to do with the running of the train, saw her crying at the station where she was left, and after she had told them that she was left, did nothing to assist her.—*Ib.*, 216.
 18. *Same.*—It is not competent to prove the fact that the plaintiff was a witness in another case against the defendant, involving a charge of improper conduct against the same conductor and flagman, as independent evidence to show that they willfully or maliciously caused her to be left short of her destination.—*Ib.*, 216.
 19. *Action of trespass admissible in evidence of statement given by defendant's deputy.*—In an action of trespass to recover damages for the wrongful taking of mules, where it is shown that at the time of the alleged taking, the defendant was sheriff of the county where the trial was had, and that in obedience to his instructions, one of his deputies went with an officer of the United States Army to which the mules belonged, for the purpose of locating said mules, and defendant's said deputy and the army officer located the mules, and took them from

EVIDENCE—*Continued.*

20. *Evidence; examination of witnesses.*—In the examination of the plaintiff, a written statement signed by the defendant's deputy reciting that the mules were taken, and to which he affixed his signature, followed by the abbreviation "D. S." is admissible in evidence.—*Fulgham v. Carter*, 227.
21. *Evidence; what admissible in forcible entry and detainer.*—Where in a suit of forcible entry and detainer, the question is one of actual possession and the plaintiff a corporation is relying upon adverse possession, any declaration, by an authorized agent, made for it and in its behalf tending to show that it did not claim the land, is admissible in evidence against it.—*Bailey v. Blacksher*, 254.
22. *Conflict in evidence; introduction of contradictory statements.* In a prosecution for assault with intent to murder, where there is conflict in the evidence as to who was the aggressor, it is admissible, after laying predicate, to prove a contradictory statement of the prosecuting witness as to material facts.—*Brown v. State*, 288.
23. *Same; same; when evidence of complaints of the injured person as to his hurts admissible.*—In an action against a carrier for negligently injuring plaintiff's intestate, which injuries are alleged to have resulted in death, and where more than eight months intervened between the date of the infliction of the injuries and the death of the intestate, and where it is a question of fact as to whether the said death was the result of said injuries or was caused by disease, evidence of deceased's complaints of hurts attributable to the alleged negligence of the defendant made throughout the time intervening between the infliction of the injuries and the death are properly admitted by the court where such evidence is confined by the court to the expressions in respect of current conditions to the exclusion of narration of past conditions and of the causation of the present conditions complained of.—*K. C. M. & B. Ry. Co. v. Matthews*, 298.
24. *Same; evidence; inability of deceased to perform manual labor after he was hurt admissible.*—In such case testimony of the deceased's wife that her husband was never able to do any manual labor after he was hurt is properly admitted.—*Ib.*, 298.
25. *Action of railroad company as warehouseman; admissibility of evidence.*—In an action against a railroad company as a warehouseman, the distance which the plaintiff lives from the depot of the defendant where the goods were stored, is irrelevant to any issue involved, and therefore testimony as to such fact is inadmissible.—*Sou. Ry. Co. v. Aldridge & Shelton*, 368.
26. *Trial of civil case; not necessary to authorize verdict.*—In the trial of a civil case, it is only necessary in order to authorize a verdict that the jury should be reasonably satisfied; and therefore, a charge which instructs the jury that they must be satisfied to a "reasonable certainty," before they can return a verdict, is erroneous, as exacting too high a degree of proof.—*Ib.* 368.
27. *Action of ejectment; admissibility of evidence.*—In an action of ejectment brought by the purchaser at a sheriff's sale against one who claims under a mortgage, it is contempt for the defendant to show that whatever title the defendant in execution owned, it passed from him before the levy and sale under the execution to plaintiff, and this is true, although the mortgage was assigned after the suit was commenced, in

EVIDENCE—*Continued.*

- which the judgment was recovered upon which execution issued.—*Carter v. Smith*, 414.
28. *Same; same; sufficiency of evidence.*—In such cases where the evidence shows that the land in question was wild and uncultivated land; that the defendant claims under a deed; pays taxes thereon; has kept trespassers off said property, and has taken tan bark therefrom, it cannot be said that the plaintiff is shown to have such peaceable possession as entitles him to relief.—*Randle & Daughdrill*, 490.
29. *Action against railroad company for breach of contract of affreightment, admissible in evidence.*—In an action against a railroad company to recover damages for the breach of a contract of affreightment, a statement and a certificate made by the conductor of the defendant relating to a transaction that was past, having reference to the freight shipped over the defendant's line, is not admissible in evidence over the defendant's objection.—*Seaboard Air Line v. Hubbard*, 546.
30. *Action upon promissory note; insanity; admissibility of evidence.* Where in an action upon a promissory note by an endorsee of said note, the defendant files a sworn plea, denying that the plaintiff was the party really interested in the note sued on, evidence that the payee of the note was insane at the time he transferred it, is competent and admissible, and it is error for the court to exclude such evidence.—*Walker v. Winn, Jr., Admr.*, 560.
31. *Evidence; when motion to exclude all the evidence properly overruled.*—A motion to exclude the whole of a witnesses' testimony, is properly overruled, if any part of such testimony is relevant and admissible.—*Barnwell v. Stephens*, 609.
32. *Unlawful detainer; admissibility in evidence of deed.*—In an action of unlawful detainer, a deed to the plaintiff is admissible to show the extent of his possession to the premises in controversy, and the fact that such deed does not convey all of the land claimed in the complaint, is no ground for its exclusion.—*Id.* 609.
33. *Evidence; motives or wishes of witness inadmissible.*—The testimony of a witness as to his uncommunicated motives, wishes or mental interests, is inadmissible.—*Id.* 609.
34. *Ejectment; what necessary for plaintiff to recover; relevancy of deed to third party.*—In an action of ejectment, in order for the plaintiff to recover he must show that he had title at the commencement of the suit, and on to the time of the trial; and therefore a deed executed by the plaintiff prior to the institution of the suit, conveying the land to a third party, which deed was regularly acknowledged and recorded, is not subject to be excluded from evidence upon the ground that it was irrelevant.—*Rottenberg v. Brown*, 630.
35. *Trover; admissibility in evidence of usury in mortgage debt.* In an action of trover brought by a mortgagee to recover damages for alleged conversion of the property conveyed in the mortgage, where the defendant sets up the defense that he had a lien upon the property in controversy by reason of a mortgage which was executed prior to the mortgage to the plaintiff, but which was not recorded, the fact as to whether the plaintiff's debt secured by the mortgage was tainted with usury, is a material inquiry, and testimony tending to show that there was usury in such debt, should be admitted when offered by defendant.—*Morris v. Bank of Attalla*, 638.
36. *Evidence; when statement not the conclusion of witness.*—In an action against a railroad company to recover damages for alleged negligent killing of a horse, where the owner testifies

EVIDENCE—*Continued.*

- that he visited the place of the accident and saw marks on the ground indicating the horse had been dragged, and this statement is, on motion of defendant, excluded, the further question propounded to the witness as to "How great a distance had this something been pushed or dragged along the track?" is not subject to the objection that it calls for the conclusion of the witness and for incompetent testimony.—*L. & N. R. R. Co. v. Pearce*, 680.
37. *Color of title: may be shown by void deed; exception.*—While as a general rule, a void deed is admissible in evidence to show color of title to the person claiming thereunder, if, however, the deed offered is void because of the uncertain and indefinite description of the land conveyed, such a deed would not convey color of title, and possession under it would be limited to *possessio pedis*.—*Brannan v. Henry*, 698.
38. *Deed; description of lands conveyed; latent ambiguity.*—Where the description of lands in a deed is by Government numbers, but the township and range are not described as being south or north, or east or west, and in the county where the land is described as being situated there are townships north and south bearing the same number as that designated in the deed in which there is the same section as that designated in the deed, such description standing alone would constitute a patent ambiguity, which could not be relieved by parol testimony of what was intended by the parties to be conveyed; but where in such deed there is a recital that the lands described therein were sold for the payment of taxes that were due from one M. D. M., the owner of said lands, such recital makes the description set forth in the deed a latent ambiguity and authorizes resort to competent parol evidence in aid of the description set forth in the deed.—*Ib.* 698.
39. *Ejectment; admissibility of evidence.*—In an action of ejectment, where the defendant sets up the defense of adverse possession of 10 years, it is competent for the defendant as a witness in his own behalf to testify that he purchased the lands described in the complaint from the State and paid a certain sum of money therefor, and that he immediately went into possession of such lands, and has remained in possession thereof ever since said purchase.—*Ib.* 698.

II. BURDEN OF PROOF.

40. *Warehouseman; burden of proof when loss of goods shown.*—If a warehouseman fails on demand to deliver goods intrusted to him, or does not account for such failure, *prima facie* negligence will be attributed to him, and the burden of proving the loss without the want of ordinary care is devolved upon him.—*Sou. Ry. Co. v. Aldridge & Shelton*, 368.
41. *Action against common carrier; burden of proof.*—In an action against a common carrier for failure to safely deliver goods shipped over its lines, where it is shown that the defendant was one of several connecting carriers, and was the discharging or delivering carrier, and the contract of affreightment stipulated that the liability of each line is limited to loss of injury occurring on its line, if it appear that the goods were in sound condition when received by the initial carrier, and it is further shown that upon their delivery to the plaintiff they were in a damaged condition, the burden is upon the defendant to show that the damage or injury did not occur while the goods were in its possession or under its control, as a common carrier.—*Waller v. Ala. Gt. Sou. R. R. Co.*, 474.

EVIDENCE—*Continued.*

III. OPINION AND EXPERT TESTIMONY.

42. *Expert testimony; competency to testify as to condition of railroad track.*—A witness who is shown to be skilled and experienced in respect of track conditions and track constructions, is competent to give opinions as to the defective and unsafe condition of a railroad track.—*Northern Ala. R. R. Co. v. Shea*, 119.
43. *Same; case at bar.*—A witness who had had long experience as a brakeman, whose duties had to do with the regulation of the speed of the train under the varying circumstances incident to a railway, according to curve, grade, etc., is qualified to give his opinion on each of these matters, and to state that a train, at a particular time and place, was running at a dangerously high speed.—*Id.* 119.

IV. PAROL AND WRITTEN.

44. *Parol evidence; when not admissible.*—Where the suit is for rent under a written lease, and the only plea is the general issue, it is not competent to show the breach of a parol agreement, it is not competent to show the breach of a parol agreement was made prior to or contemporaneously with the written lease, the evidence would violate the salutary rule against introducing parol evidence to alter or add to a written agreement, and if made after the execution of the lease, it was without consideration. Moreover in either aspect this evidence would not be admissible under the plea of the general issue as this defense could only be raised under a plea of recoupment or set-off.—*Morningstar v. Queens*, 186.

V. WEIGHT AND SUFFICIENCY.

45. *Proof of averment in complaint; common knowledge of jury.* An averment in a complaint that "the rails were insecurely fastened to the cross ties" is sufficiently proved, if the evidence shows that ties were rotten, the jurors common knowledge being sufficient to afford them necessary assurance that rotten wood will not hold a rail or spike.—*North Ala. R. R. Co. v. Shea*, 119.
46. *Evidence; what sustains averment of complaint.*—Where the complaint described the leased premises as "being the building which was on the date of the demise of the property occupied by R. Seal as a grocery store," and the lease which is introduced in evidence describes the property as "being the building which is now occupied in part by R. Seal as a grocery, and Johnson Bros. as a saloon," there is no variance between the pleading and the proof.—*Morningstar v. Queens*, 186.
47. *Safeguards of a ferry; credibility of testimony.*—Where it is shown that a ferry boat did not have a rear guard, evidence to the effect that subsequent to the accident, the ferry owners did install a rear-guard is not admissible to prove such installation as an independent abstract fact, but is competent on the cross-examination of defendants themselves after they had testified that there was no occasion for such safeguard in a properly constructed boat and that it was not customary to have such rails on other properly equipped and operated ferryboats, as going to the credibility of such testimony. ferryboats, as going to the credibility of such testimony. *Frierson v. Frazier*, 232.
48. *Wanton, wilful or intentional negligence; insufficiency of evidence to support count charging same.*—In an action against

EVIDENCE—*Continued.*

a railroad company, the affirmative charge should be given against a count, charging wanton, willful or intentional negligence, where the only evidence tending to support same was that the whistle was not sounded nor the bell rung, as the train approached the crossing near which plaintiff was injured.—*N. C. & St. L. Ry. Co. v. Harris*, 249.

49. *Injunction; equity jurisdiction; evidence relating to lease of land.*—Where at the time of leasing a certain tract of land, the lessee is the colonel of a regiment of the Alabama National Guards, and the lease contract is made to the lessee in his own name, and thereafter an encampment of said regiment is held upon the leased premises, the proof of the fact that the lease contract was made, not for the lessee individually, but for the benefit of his said regiment, and that it was the regiment's lease, and not the lessee's, can be made, if at all, as well in a suit at law by the lessee against the lessor for a breach of contract of lease, as in a court of equity; and the necessity of making such proof as a defence to the claim of the lessee, constitutes no ground for a resort to a court of equity by the lessor for the purpose of enjoining an action at law.—*Cox v. O'Neal*, 314.
50. *Action upon promissory note; material alteration avoids contract; evidence.*—An alteration which makes a promissory note speak a language different in legal effect from that which it originally spoke, is material, and when made by one not a stranger to the paper, is sufficient to avoid the contract as to all parties not consenting thereto; and in an action upon such note, under issues properly presented, evidence tending to show such material alteration is admissible.—*Carroll v. Warren*, 398.
51. *Action upon a note; failure of consideration; general affirmative charge.*—In an action upon a promissory note, where the defendant pleads a failure of consideration, to which special plea the plaintiff files a special replication, and there was evidence supporting the plea setting up a failure of consideration, and there was no evidence introduced by the plaintiff to prove the material affirmance of his replication, the defendant is entitled to the general affirmative charge, and it is not error for the court to give such charge at defendant's request.—*Id.* 398.
52. *Trover; elements of conversion; when sufficient demand not shown.*—When personal property has been placed by the owner in possession of another, before the latter can be guilty of conversion, the evidence must show that a demand has been made by the owner or his agent, for the return of the property, and that the holder thereof has refused to surrender the same; and in an action of trover for the wrongful conversion of such property, where the evidence shows that a demand was made for its return by the attorney who instituted the suit, and such demand was refused, but there is no proof that the attorney had authority from the owner of the property to make the demand, there is not shown such a demand of the property as will authorize the recovery in an action of trover.—*Jesse French Piano Co. v. Johnston*, 414.

See CRIMINAL LAW, SUB-TITLE.

FEES.

1. *Mortgage; stipulation for payment of attorney's fee.*—The provision contained in a mortgage that the proceeds of the sale from the mortgage should be devoted, first, to the payment

FEES.

of the expenses of said sale, "including a reasonable attorney's fee for collecting said sum, whether by foreclosure of under order of sale, or by proceedings in court or otherwise," is sufficient to authorize the allowance of an attorney's fee for filing a bill in equity to foreclose said mortgage.—*Langley v. Andrews*, 655.

FERRY.

1. *Liability of owners of ferry as common carrier.*—Where a passenger on a ferry boat continues in immediate charge and custody of his wagon and team during the passage on a ferry boat and assumes to control the team during the passage across the river, the ferry owners are not liable as common carriers in respect of the loss of his property, resulting from the team backing off into the river, but only for their negligence causing that disaster.—*Friersen v. Frazier*, 232.
2. *Liability of owners of ferry; contributory negligence.*—In an action against ferry boat owners to recover damages for the loss of team backing into the river, where the issue of contributory negligence was involved, with evidence tending to support same, a charge to the jury that "If from the evidence you are reasonably satisfied that the defendant was guilty of negligence and that such negligence was the direct cause of the injuries complained of, your verdict should be for plaintiff" is improper.—*Ib.*, 232.
3. *Same; liability to passenger transported free.*—Where no charge or compensation is made or to be made, and no compensation is to be exacted, directly or indirectly, for the transport of plaintiff's property, and this is so understood by him at the time, the ferry owners are liable to him only for the consequences of gross negligence.—*Ib.*, 232.
4. *Same: where transportation without fee is part of contract for work.*—If the plaintiff, in action for recovery of damages for loss of team while crossing river on ferry boat, has a contract for work with the owners of the ferry boat and the customary money fee for transportation is not exacted from him in consequence of the fact that the transport was being made in carrying out a contract for work which he had with that company and the pretermisison of the usual charge was in any sense a part of that contract, the attempted transport is not gratuitous and the rights of the plaintiff are the same as if regular toll had been exacted.—*Ib.*, 232.
5. *Safe-guards of a ferry; credibility of testimony.*—Where it is shown that a ferry boat did not have a rear guard, evidence to the effect that subsequent to the accident, the ferry owners did install a rear-guard is not admissible to prove such installation as an independent abstract fact, but is competent on the cross-examination of defendants themselves after they had testified that there was no occasion for such safeguard in a properly constructed boat and that it was not customary to have such rails on other properly equipped and operated ferryboats, as going to the credibility of such testimony.—*Ib.* 232.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. *Color of title; when deed admissible as.*—In an action of forcible entry and detainer, the plaintiff after offering evidence, that it was, prior to the entry of the defendant on the lands in controversy, in the actual possession of another portion of the lands described in a deed which also conveyed the lands in dispute, may introduce the deed in evidence as color of title.—*Bailey v. Blacksher Co.*, 254.

FORCIBLE ENTRY AND UNLAWFUL DETAINER—*Continued.*

2. *Same; possession under, to what extends.*—Mere color of title does not draw possession to one who is not in, or does not take, actual possession of some part of the land conveyed; but *possessio pedis* of any part of the land conveyed, in law, is held to be actual possession of the entire tract.—*Ib.* 254.
3. *Same; possession under, requisites of.*—Possession which will entitle a plaintiff in an action of forcible entry and detainer, to recover must be such title that if continued for the necessary period would vest him with the legal title as against the true owner, if there were an outstanding title; and actual possession of part of the premises embraced in a deed, if accompanied by disclaimer of title and possession and ownership as to a part not actually occupied, does not extend possession under the deed to the portion as to which there is a disclaimer.—*Ib.* 254.
4. *Evidence; what admissible in forcible entry and detainer.*—Where in a suit of forcible entry and detainer, the question is one of actual possession and the plaintiff a corporation is relying upon adverse possession, any declaration, by an authorized agent, made for it and in its behalf tending to show that it did not claim the land, is admissible in evidence against it.—*Ib.* 254.
5. *General charge; when improper.*—Where the plaintiff in a forcible entry and detainer suit, in order to establish possession of the part of land in dispute, shows actual possession of another part of said land conveyed by a deed, and there is evidence tending to show that while holding actual possession under the deed of part of the land conveyed, there was a disclaimer of ownership and title as to the part in dispute, the general charge in favor of plaintiff should not be given, but it should be left to the jury to decide whether plaintiff had possession of the disputed lands.—*Ib.* 254.
6. *Unlawful detainer; possession by tenant.*—Where a tenant, who is in possession, attorns to one who claims the ownership of the property, the person to whom he has so attorned, can maintain an action of unlawful detainer against such tenant for his holding over after the termination of the term of his lease.—*Barnwell v. Stephens*, 609.
7. *Same; tenant at will; necessity for terminating tenancy.*—Where one is in possession of land as a tenant at will of the owner, before the owner can maintain an action for unlawful detainer, he must give notice to the tenant of his desire and intention to terminate the tenancy, and then must make, after such notice, a written demand for the delivery of the possession of the land; and in such an action where there is no proof showing a termination of the defendant's possessory interest, he is entitled to the general affirmative charge.—*Ib.* 609.
8. *Unlawful detainer; sufficiency of written demand for possession by attorney of landlord.*—While the statute gives the agent or attorney of a landlord, the authority to make a written demand upon the tenant for delivery of possession, before such a landlord can maintain an action for unlawful detainer, it must be shown by the evidence that the attorney who makes the demand was in fact at the time it was made, the attorney of the landlord; and the subsequent bringing of the suit by an attorney does not create the presumption that he was the landlord's attorney at the time the written demand was made.—*Ib.* 609.
9. *Unlawful detainer; admissibility in evidence of deed.*—In an action of unlawful detainer, a deed to the plaintiff is admissible to show the extent of his possession to the premises in

FORCIBLE ENTRY AND UNLAWFUL DETAINER.—Continued.

controversy, and the fact that such deed does not convey all of the land claimed in the complaint, is no ground for its exclusion.—*Ib.* 609.

10. *Unlawful detainer; statute of limitation.*—In an action of unlawful detainer, where it is shown that the defendants attorned to the plaintiffs within three years prior to the bringing of the suit, the statute of limitation of three years is not available to the defendant.—*Ib.* 609.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances; sale of property by partnership.* Where upon the dissolution of a partnership, it is stipulated in the agreement providing therefor that one of the parties should take the partnership property and pay the partnership debts, and after delivery of the partnership property to him, said partner, so assuming the debt, makes a fraudulent sale of said property, such property, in the hands of the fraudulent vendee, is liable to the payment of the partnership debts, and can be subjected thereto by creditors of the partnership. *Schwarz, R & Co. v. Bailey*, 439.

GUARDIAN AND WARD.

1. *Guardian and ward; jurisdiction of probate courts and of chancery courts.*—The jurisdiction of the probate courts and courts of chancery are concurrent in matters of guardianship, and the ward has an unqualified right of electing the forum in which he will seek a settlement of the guardianship.—*Mathews v. Mauldin*, 434.
2. *Same; when final settlement in probate court void.*—When final settlement made in the probate court by a guardian before his resignation or removal, and during the minority of the ward, is void for want of jurisdiction of said court.—*Ib.* 434.
3. *Liability of different sets of sureties on guardian's bond.*—A bill by a ward against the guardian and several sets of sureties on his bond is not bad on the ground for misjoinder, and multifariousness.—*Ib.* 434.
4. *Same; execution of bond.*—A guardian's bond executed by the bondsmen and not by the guardian is good as a common law liability.—*Ib.* 434.
5. *Same; liability of sureties on the first bond.*—The sureties on the old bond of the guardian are liable for any *devastavit* prior to their release on the approval of the new bond.—*Ib.* 434.
6. *Same; liability of new bondsmen.*—The sureties on a new bond of a guardian are liable on said bond for misappropriations by the guardian before the making of a new bond upon the ground of the guardian's obligation to make a true account.—*Ib.* 434.

HEIRS.

1. *Significance of term "bodily heirs." when used in conveyance.* Where a conveyance is made to a person and her "bodily heirs," such instrument conveys to such person a fee simple in the lands conveyed, unless a contrary intention on the part of the grantor appear on the face of the instrument. *Edins v. Murphree*, 617.
2. *Same.*—The words "bodily heirs," in their ordinary legal significance, are taken to mean the issue of the body of a person in all generations to the end of time, rather than as meaning "children," as the first generation of issue of such person's body.—*Ib.* 617.

HUSBAND AND WIFE.

1. *Indictment for abandoning family; wife competent witness.*—The statute making the wife a competent witness against her husband under an indictment for abandoning his family (Acts 1903, p. 32), is not an *ex post facto* law within the meaning of the constitutional provision.—*Wester v. State*, 56.
2. *Title; husband and wife.*—When there is a controversy as to whether property belongs to the husband or to the wife, the possession of the husband is not adverse to the wife, and such possession is not evidence of the husband's title.—*Anglin v. Thomas*, 264.
3. *Same; same; repetition of charges.*—A charge setting forth above principle, is not a mere repetition of a charge that "the possession of the husband is the possession of the wife when the title to the property is shown to be in the wife," as said last quoted charge ignores the consideration that the husband's possession is not evidence against the wife's title.—*Id.* 264.
4. *Husband and wife; power of wife to alienate lands, includes power to mortgage.*—The general power of a married woman to alienate her lands with the assent and concurrence of her husband, as conferred by the act approved Feb. 28th, 1887, "To define the rights and liability of the husband and wife," confers upon a married woman the unlimited power of alienation, so far as the character of the conveyance is concerned, and includes the power to execute a mortgage or deed of trust to secure her debts.—*Collier v. Alexander*, 422.
5. *Husband and wife; res adjudicata as to mortgage being given to secure husband's debt.*—Where in a suit in equity one of the issues involved is whether a mortgage executed by a married woman, conveying her separate property, was given to secure the debt of her husband, and in the decree rendered it was ascertained that said mortgage was not given to secure the husband's debt, such question becomes *res adjudicata* as between the mortgagor and persons claiming under the mortgage; and the fact that such decree was appealed from and was pending at the time of an action of ejectment for the lands included in the mortgage, but was not superseded, does not authorize the introduction in the ejectment suit of evidence touching the issue as to whether the mortgage was given to secure the husband's debt, which was adjudicated by the decree in the chancery court; but a record of the proceedings in said chancery suit is admissible in evidence.—*Id.* 422.
6. *Deposit of money in bank by husband in name of wife; when cannot be drawn out by wife.*—Where a husband deposits money in a bank in the name of his wife, receiving a book showing that an account was opened in the name of the wife, and that she was credited with the amount of the deposit, and at the same time he delivered to the bank a signature card which contained the direction in the name of the wife, that in the payment of funds and other transactions the signature to be recognized by the bank was the name of the wife per the husband making the deposit, upon the death of said husband, the wife cannot draw out the money remaining on deposit on check bearing her signature, nor can she recover such money in a suit against the bank.—*First National Bank of Montgomery v. Taylor*, 456.
7. *Divorce; when will not be granted on grounds of insanity.*—Where a bill is filed by a husband praying for a divorce from his wife upon the ground of her insanity, and it is shown that prior to the filing of the bill complainant and defendant

HUSBAND AND WIFE—*Continued.*

had been married for 33 years and that soon after the marriage the complainant had notice of the conditions upon which it was sought to predicate insanity, it is proper for the court to decline to grant the divorce; the complainant having waited too late to proceed in the premises.—*Price v. Price*, 631.

8. *Action of assumpsit; when plaintiff entitled to recover for services of wife.*—In an action brought by plaintiff to recover an amount alleged to be due for services as a teacher—where defendant sets up the fact that plaintiff during part of the time alleged to have been covered by such services, was sick and the evidence tended to show that during such time the wife of plaintiff taught for him, and it is open to the jury to find that the defendant accepted the services of the wife in lieu of the plaintiff, it is error for the court to instruct the jury that they could not find for the plaintiff for services rendered by his wife.—*Sou. Ind. Ins. v. Hellier*, 686.
9. *Same; same.*—In such an action where one of the items of the account sued on was the salary earned by plaintiff's wife, and the plaintiff testified that the salary earned by his wife during such time belonged to him, the creditability of such evidence was a question for the jury, and it would be error to instruct the jury that the plaintiff could not recover anything for the salary promised to be paid his wife.—*Ib.* 686.

INJUNCTION.

SEE CHANCERY SUB-TITLE.

INSANITY.

1. *Insanity; contracts of insane persons absolutely void.*—In this state, a contract of an insane person, whether it be a deed or any other form of contract, and whether written or resting in parol, is absolutely void; and therefore a party contracting with an insane person takes no benefit under such contract, nor acquires any title to property obtained by virtue of such contract.—*Walker v. Winn, Jr., Admr.*, 560.
2. *Insanity; endorsement of promissory note by payee who is insane, void, and confers no right upon endorser.*—The endorsement of a promissory note by the payee therein who is insane, is void and confers no right upon the endorser; and in an action by the endorsee upon a note so endorsed against the maker thereof, the insanity of the payee and endorser at the time of the endorsement and transfer, is a valid defense and can be interposed to the maker.—*Ib.* 560.
3. *Action upon promissory note; insanity; admissibility of evidence.* Where in an action upon a promissory note by an endorsee of said note, the defendant files a sworn plea, denying that the plaintiff was the party really interested in the note sued on, evidence that the payee of the note was insane at the time he transferred it, is competent and admissible, and it is error for the court to exclude such evidence.—*Ib.* 560.
1. *Divorce; when will not be granted on grounds of insanity.* Where a bill is filed by a husband praying for a divorce from his wife upon the ground of her insanity, and it is shown that prior to the filing of the bill complainant and defendant had been married for 33 years and that soon after the marriage the complainant had notice of the conditions upon which it was sought to predicate insanity, it is proper for the court to decline to grant the divorce; the complainant having waited too late to proceed in the premises.—*Price v. Price*, 631.

INSURANCE.

1. *Construction and interpretation of laws of benefit order by us officers; not binding on courts or members of order.*—The decisions of a benefit order, or of its officers, has no binding effect on the members or their beneficiaries, and the construction given to any of the provisions of a contract of insurance by the officers of the society is not binding on the courts, and the members are not bound by any acts, which may have been done by them under such a construction. Evidence showing such decisions and interpretations is properly excluded.—*Morey v. Monk*, 175.
2. *Same; same; same; case at bar.*—In an action by the heirs at law of an intestate to recover, from the step-son of such intestate, the amount paid by a benefit society to such step-son, on an insurance policy in such society, where the laws of the State and the rules of the order, at the time the policy was issued, required that the beneficiary be either a "member or members of his family, blood relations or person or persons dependent on him" the ruling of the trial court as to the facts, and the soundness of his conclusions and judgment, where same are not shown by the bill of exceptions and exception shown to have been taken thereto, are presumed to have been correct, unless based on evidence improperly admitted.—*Ib.* 175.
3. *Same; case at bar.*—In an action by the heirs at law of an intestate to recover from the intestate's step-son, who has been named as beneficiary in a benefit certificate, the proceeds of such certificate, the application of membership of intestate, the benefit certificate to intestate's wife, who was also defendant's mother, the surrender after her death, the benefit certificate of defendant, the payment of assessments by the insured and the proof of his death, relate to the history of the insurance contract and to the defendant's right and title thereunder, and are properly admissible in evidence.—*Ib.* 175.
4. *Pleading and practice; what plea insufficient.*—A plea filed to a complaint upon a fire insurance policy which merely alleges that the plaintiff ought not to recover in the action upon the contract sued on by reason of anything alleged in the complaint is demurrable because it neither denies nor confesses and avoids the allegations of the complaint.—*Cont. Ins. Co. v. Parks*, 650.
5. *Same; same; pleas alleging conclusions of law and not statement of facts.*—In an action upon a fire insurance policy a plea alleging that in and by the terms of the policy it is provided that the contract may be cancelled, and that in accordance with the terms of the policy in regard to cancellation the said policy was cancelled by the defendant before the loss occurred, merely alleges the conclusions of the pleader and is demurrable for failing to set out the terms of the policy sued on so that the court could determine the right of defendant to cancel and thereby terminate its liability thereon.—*Ib.* 650.
6. *Same; same.*—A plea alleging that defendant did not issue any policy to plaintiff but that it did issue one to plaintiff's husband which subsequently was cancelled and surrendered is a plea of *non est factum* and must be sworn to.—*Ib.* 650.
7. *Same; same; when plea insufficiently alleges notice to assured of intention to cancel policy.*—In an action upon a fire insurance policy one of defendant's pleas alleged that the policy was originally issued to the husband of the plaintiff and loss if any, was made payable to R. M. as mortgagee as his interest might appear. That afterwards said R. M. returned said policy

INSURANCE—*Continued.*

to defendant's agent and had same changed so that plaintiff became the assured and J. M., the wife of the said R. M., was named as mortgagee and loss, if any, made payable to her as such mortgagee as her interest might appear, and that the said J. M. then took possession of said policy and it was not thereafter in the possession of the plaintiff. That by the terms of said policy defendant on notice for the space of five days had the right to cancel said policy and that subsequently said defendant did give notice to the said J. M. that it would cancel said policy and the said J. M. thereupon surrendered said policy to the defendant and the same was cancelled by defendant before the loss occurred. Held: that said plea is fatally defective in failing to show notice to the assured of defendant's intention to cancel the policy. Held further, that notice to the mortgagee would not be sufficient notice to entitle defendant to cancel, but such notice must have been to assured.—*Ib.* 650.

8. *Same; same; right of Insurance Company to cancel policy strictly construed against Company.*—A provision in an insurance policy reserving to the insurer a right to cancel same is strictly construed and the conditions imposed upon it with respect to giving notice of cancellation must be strictly performed.—*Ib.* 650.
9. *Same; same; what sufficient notice of loss to an insurance company.*—Where a policy of insurance provides that if a fire occur the insured shall give immediate notice of any loss thereby in writing to the company, an allegation that the insurance company had actual notice of the loss within forty-eight hours after the fire is not a sufficient allegation of notice by the insured.—*Ib.* 650.
10. *What considered not a waiver of provision in policy requiring notice of loss.*—Where a policy of insurance provides that if a fire occurs the insured shall give immediate notice of any loss thereby in writing to the Company, a statement by the local agent of the Company to the assured that the policy had been cancelled before the loss and that the Company denied liability thereunder does not constitute a waiver by defendant of the notice required by the policy unless the agent had authority to bind the Company by his statement.—*Ib.* 650.
11. *Statutory provision that Insurance Company belonging to a tariff association pay penalty not unconstitutional.*—Section 2619 of the Code of Alabama providing that in case of loss an insurance policy issued by an insurer who belonged to or was a member of or in any wise connected with any tariff association or such like thing by whatever named called, etc., shall be construed to mean that the assured or beneficiary thereunder may in addition to the actual loss or damage suffered recover 25 per cent. of the amount of such actual loss, any provision or stipulation to the contrary in the policy notwithstanding is a legitimate exercise of the police power of the State.—*Ib.* 650.
12. *Same.*—Such statutory provision is not violative of the constitutional provision for singling out particular persons or corporations and discriminating against them.—*Ib.*, 650.
13. *Same; said provision applies to foreign Insurance Companies as well as domestic.*—The fact that the insurer happens to be a foreign corporation does not render the provision unconstitutional or void as to it.—*Ib.* 650.
14. *Same; same; insurance companies are not engaged in inter-state commerce.*—Insurance companies organized in other states

INSURANCE—*Continued.*

and issuing policies in this State are not engaged in inter-state commerce, nor are the contracts of insurance entered into by such companies in this State inter-state transactions. *Ib.* 650.

15. *Authority of agent to waive written notice provided for in policy; when such authority question of fact for the jury.* Where the local agent of an insurance company performs acts at various times not expressly conferred by the instrument appointing it as agent and such acts were recognized by the principal as within the authority of the agent and were not repudiated by it, it is a question of fact for the jury to determine whether or not the agent had authority to waive for defendant company a provision in the policy requiring written notice of loss to be given immediately after a fire occurred.—*Ib.* 650.
16. *Same; what sufficient waiver of notice.*—If the local agent had authority to bind its principal a distinct denial of defendants liability because the policy had been cancelled would be a waiver of notice and proof of loss required of the assured by the policy.—*Ib.* 650.

JUDGMENTS AND DECREES.

1. *Jurisdiction of circuit and city courts; when judgment for less than limit of jurisdiction, suit should be dismissed.*—Where, in an action of assumpsit brought in the circuit or city court to recover \$100.00, the verdict and judgment are for \$13.50, and the amount claimed was not reduced by reason of a set-off successfully made by the defendant, said judgment, being below the minimum amount of the court's jurisdiction, should, upon motion made by defendant, be set aside and the suit dismissed, (Code, Sec. 3315.)—*Smith v. Allen*, 148.
2. *Filing of claim against insolvent estate; applies to judgments against intestate and not to judgments against administrator.* The requirement of section 306 of the Code, that all claims against an estate which has been declared insolvent must be filed within six months from the declaration of insolvency applies to judgments rendered before such decree of insolvency against the intestate, and not to those judgments rendered against the administrator.—*Woodal v. Wright*, 205.
3. *Declaration of insolvency as defense by administrator's sureties against judgment rendered previously to such declaration.* (Acts 1898-99, p. 85).—In an action against an administrator's bondsmen to recover a judgment against such administrator, a plea relying on the fact that the intestate's estate had been declared insolvent, since the rendition of such judgment, presents an immaterial issue.—*Ib.*, 205.
4. *Judgment against administrator; bondsmen not estopped thereby from denying want of assets.*—The sureties on an administrator's bond are not estopped by a judgment against such administrator, in action against them to recover the amount of such judgment, from denying that the administrator had come into the possession of assets with which to discharge the indebtedness.—*Ib.*, 205.
5. *Same; same; defective plea.*—A plea by his bondsmen which avers only that sufficient assets did not come into the possession of the administrator to pay the judgment against him, is defective.—*Ib.*, 205.
6. *Judgment; amendment nunc pro tunc.*—Where a judgment is amended nunc pro tunc, an execution issued upon said judg-

JUDGMENTS AND DECREES—*Continued*

- ment properly recites the date of the original judgment as the date of the rendition of the judgment on which it was issued; and such an execution is admissible in evidence in an action of ejectment by the purchaser at a sale under said execution to recover the lands so sold.—*Carter v. Smith*, 414.
7. *Action upon a judgment; sufficiency of complaint.*—In an action upon a judgment, the complaint is sufficient if it sets forth the court by which the judgment was rendered, the place at which the court was held, the names of the parties, plaintiff and defendant, the date of its rendition, and the amount recovered; and it is not necessary in such a complaint to allege any particular reason for bringing the action upon the judgment theretofore recovered, other than that it was unpaid.—*Kaufman v. Richardson*, 430.
 8. *Action upon a judgment; can be maintained within a year and a day.*—An action can be maintained upon a judgment within a year and a day from its rendition, which is before the expiration of the time after the rendition of the judgment within which an execution could be issued thereto to enforce it.—*Id.* 430.
 9. *Appeal; when taken from decree dismissing bill.*—Where a cause in a chancery court is submitted for a decree upon a motion to dismiss for the want of equity, and upon demurrers, and the chancellor renders a decree sustaining the motion to dismiss the bill for the want of equity, and orders that the bill be dismissed out of court, such decree is a final decree, from which an appeal may be prosecuted any time within a year from its rendition.—*Schwarz, R. & Co. v. Bailey*, 439.
 10. *Judgment of Elmore circuit court; invalidity thereof.*—A judgment rendered in the circuit court of Elmore county, which is convened at a time fixed by an act creating the 15th judicial circuit, which act is unconstitutional and void, and at a time different from that fixed by law prior to the passage of said act, is void, and an appeal therefrom will be dismissed.—*Kidd v. Burke*, 625.

JURISDICTION.

1. *Jurisdiction of circuit and city courts; when judgment for less than limit of jurisdiction, suit should be dismissed.*—Where, in an action of assumpsit brought in the circuit or city court to recover \$100.00, the verdict and judgment are for \$13.50, and the amount claimed was not reduced by reason of a set-off successfully made by the defendant, said judgment, being below the minimum amount of the court's jurisdiction, should, upon motion made by defendant, be set aside and the suit dismissed, (Code, Sec. 3315.)—*Smith v. Allen*, 148.
2. *Justice of the peace; amendment of claim so as to bring it within the jurisdiction of justice.*—In a civil suit brought before a justice of the peace, the plaintiff may, at any time before or at the time of the rendition of judgment remit the excess of his demand over and above the sum for which justice is authorized to render judgment, so as to bring the case within his jurisdiction.—*Webb & Stagg v. McPherson*, 540.
3. *Justice of the peace; want of jurisdiction must appear in face of proceedings on appeal.*—Where the question of the want of jurisdiction in a justice of the peace to render a judgment, is raised in the circuit court in proceedings by common law certiorari to vacate the judgment, the want of jurisdiction must appear upon the face of the proceedings filed by the justice in the circuit court in response to the writ of certiorari; and in said circuit court it cannot be shown that the record recitals certified by the justice were not true.—*Id.* 540.

JUSTICES OF THE PEACE.

1. *Justice of the peace; amendment of claim so as to bring it within the jurisdiction of justice.*—In a civil suit brought before a justice of the peace, the plaintiff may, at any time before or at the time of the rendition of judgment remit the excess of his demand over and above the sum for which justice is authorized to render judgment, so as to bring the case within his jurisdiction.—*Webb & Stagg v. McPherson Co.*, 540.
2. *Justice of the peace; want of jurisdiction must appear in face of proceedings on appeal.*—Where the question of the want of jurisdiction in a justice of the peace to render a judgment, is raised in the circuit court in proceedings by common law certiorari to vacate the judgment, the want of jurisdiction must appear upon the face of the proceedings filed by the justice in the circuit court in response to the writ of certiorari; and in said circuit court it cannot be shown that the record recitals certified by the justice were not true.—*Ib.* 540.
3. *Justice of the peace; common law certiorari; judgment cannot be rendered against sureties on certiorari bonds.*—The statute which provides that when on certiorari the judgment is affirmed, judgment must be rendered against the sureties on the certiorari bond, as well as the principal (Code § 493), applied exclusively to statutory certiorari; and when a bond is given for common law writ of certiorari, to bring up to the circuit court, the proceedings before a justice of the peace, upon the affirmation of the judgment, it is error to render judgment against the surety on the certiorari bond.—*Ib.* 540.

JURY AND JURORS.

1. *Presence of stenographer in grand jury room; when authorized.* A plea in abatement setting up that there was present during the examination of the witnesses before the grand jury which found the indictment, a stenographer, duly sworn as such for the grand jury, and who was not a member thereof, is bad on demurrer, the act of December 10, 1900 (Acts 1900-01, p. 308) authorizing the employment of a stenographer to attend before the grand jury.—*Smith v. State*, 14.
2. *Concurrence of grand jurors; when shown.*—Where the record shows that the grand jury which returned the indictment was composed of seventeen members, a plea in abatement, that one of the jurors was by reason of extreme deafness incompetent to hear the evidence, is bad on demurrer, since it does not appear that sixteen of the grand jurors did not hear the evidence and vote upon it to find the indictment.—*Ib.*, 14.
3. *Indictment; invalid when preferred by grand jury at a time not legally held.*—An indictment which is preferred by a grand jury organized at a term of the Circuit Court which is held at a time not authorized by law, is void, and will not support a judgment of conviction.—*Skinner v. State*, 46.

LACHES.

1. *Laches; constituents thereof.*—The laches which will deprive a party from claiming equitable relief is the intentional failure to resist the assertion of an adverse right; and, therefore, laches cannot be imputed to one who is ignorant of his rights, and for that reason alone fails to assert them.—*Mullen v. Walton*, 166.
2. *Enforcement of express trust; when laches not shown to exist; decedent's estate.*—A testator who left surviving him a wife and a minor child 11 years old, provided in his will that after a specific allowance to the wife, the balance of his estate should

LACHES—*Continued.*

be divided equally between his wife and child, and also provided in the will that his wife should have the care, maintenance and education of his child and for that purpose he gave to the wife the control and management of all the moneys of his child under his will. The child was kept in ignorance of the provisions of her father's will, and knew nothing of the creation of the trust for her benefit. At different times the wife of the testator admitted her obligations to the child. The wife of the testator induced the child to go and live in a distant State with her aunts, and at no time did the wife make any provisions or give any moneys to the child or her aunts for her benefit. 37 years after the probate of the will of the testator, the wife died, leaving a substantial estate, and left a will which was invalid because not witnessed. By this will she bequeathed \$1500 to said child as "her rightful portion." After the death of the wife, the child, upon investigation, discovered for the first time the provisions of her father's will, and then a few months after the ascertainment of the facts filed a bill in chancery for the establishment and enforcement of the trust created by her father's will for her benefit and for an accounting. *Held*: that there was by the father's will created a trust for the benefit of the child, and the surviving wife was the trustee, and that by reason of the child having been kept in ignorance of her rights, she was not guilty of laches which would deprive her from seeking in a court of equity the establishment and enforcement of the express trust in her behalf as against the estate of the deceased wife.—*Ib.* 166.

3. *Equitable relief; defendant at law not barred after judgment rendered; laches.*—A defendant in a suit at law having only a purely equitable defense to the cause of action stated in the complaint, is not barred of his equity by the mere fact that he waits to file his bill until judgment has been entered against him in the suit at law, and such delay in asking for relief in a court of equity does not constitute laches.—*Hooper v. Birchfield*, 138 Ala. 423, overruled.—*Humphries v. Adkins*, 517.

LANDLORD AND TENANT.

1. *Unlawful detainer; possession by tenant.*—Where a tenant, who is in possession, attorns to one who claims the ownership of the property, the person to whom he has so attorned, can maintain an action of unlawful detainer against such tenant for his holding over after the termination of the term of his lease.—*Barnwell v. Stephens*, 609.
2. *Same; tenant at will; necessity for terminating tenancy.*—Where one is in possession of land as a tenant at will of the owner, before the owner can maintain an action for unlawful detainer, he must give notice to the tenant of his desire and intention to terminate the tenancy, and then must make, after such notice, a written demand for the delivery of the possession of the land; and in such an action where there is no proof showing a termination of the defendant's possessory interest, he is entitled to the general affirmative charge. *Ib.* 609.
3. *Unlawful detainer; sufficiency of written demand for possession by attorney of landlord.*—While the statute gives the agent or attorney of a landlord, the authority to make a written demand upon the tenant for delivery of possession, before such a landlord can maintain an action for unlawful detainer, it must be shown by the evidence that the attorney

LANDLORD AND TENANT—*Continued.*

who makes the demand was in fact at the time it was made, the attorney of the landlord; and the subsequent bringing of the suit by an attorney does not create the presumption that he was the landlord's attorney at the time the written demand was made.—*Ib.* 609.

4. *Unlawful detainer; statute of limitation.*—In an action of unlawful detainer, where it is shown that the defendants attorned to the plaintiffs within three years prior to the bringing of the suit, the statute of limitation of three years is not available to the defendant.—*Ib.* 609.

LEGISLATURE AND LEGISLATION.

1. *Constitutional law; sufficiency of affidavit accompanying notice of local law.*—An affidavit accompanying the notice given of the intention to introduce a local law as required by Section 106 of the Constitution, which is headed: "State of Alabama, Walker County," and then recites that before the officer certifying the affidavit there appeared a certain named person known "to be the editor and manager of the Mountain Eagle, a newspaper published at Jasper, in said County, who, being duly sworn, deposes and says that the attached notice was published once a week for four successive weeks in said newspaper before the making of this affidavit," is a sufficient affidavit and proof of notice.—*Childers v. Shepherd*, 385.
2. *Same; what is sufficient spreading of notice and proof upon the Journal.*—The pasting on the Journal of the House of Representatives and Senate of a newspaper clipping which contained the publication in full of a local bill, together with a typewritten copy of the affidavit of the publisher of the newspaper in which it was printed, constitutes a spreading of notice and proof of the intention to introduce such local bill in the Legislature, upon the Journal of each House, in compliance with Section 106 of the Constitution.—*Ib.* 385.
3. *Same; same.*—Where it appears from the Journal of each House of the Legislature that there was a joint resolution on the last day of the session of the Legislature which authorized the spreading upon the Journal of each House of the proof by affidavit of the publication of all local bills passed by the Legislature at that session, and that at the end of all of the proceedings of the last day of the session, as set forth in the Journal, there was a spreading thereon of the notices and proof of notices of local bills, including the one in question, followed by a recital of the final adjournment of the Legislature, certified by the presiding officer and attested by the secretary and clerk, there is shown a sufficient compliance with the provisions of Section 106 of the Constitution relating to such local bills.—*Ib.* 385.
4. *Constitutional law; Legislature may pass act to take effect upon some future event.*—The Legislature may pass a valid statute to take effect upon the happening of a future event, and such statute will not on that account be held unconstitutional.—*Ib.* 385.
5. *Same; same; local law.*—A valid local law may be passed by the Legislature to take effect by its ratification by the people of the county or district to be affected thereby.—*Ib.* 385.

LICENSES.

1. *Constitutional law; engaging in business of emigrant agent without obtaining license.*—The Act of the Legislature, approved October 1, 1903, "to prohibit emigrant agents from plying their vocation within the State without first obtaining

LICENSES.—*Continued.*

- a license therefor," is not violative of the 14th amendment of the Constitution of the United States, or of section 31 of the Constitution of Alabama; and said act is, therefore, valid.—*Kendrick v. State*, 42.
2. *Marriage; when license not properly issued, and does not authorize solemnization of marriage.*—While the statutory duty of a judge of probate to issue marriage licenses is ministerial, it is nevertheless a duty involving official and personal discretion, and cannot be delegated to another not authorized by statute to exercise such duty; and therefore, where marriage licenses are signed in blank by a probate judge, and delivered to a justice of the peace with directions to fill in the blanks as, occasion may arise, the issuance of such licenses by the justice of the peace filling in the names of the parties, and date of its issuance does not constitute a valid marriage license, and furnishes no authority for the solemnization of the marriage between the parties named therein.—*Hawkins v. Hawkins*, 571.
 3. *Same; invalid when without license not followed by co-habitation.*—A marriage solemnized by a justice of the peace without a valid license, and which is not followed by co-habitation, is not valid either as a statutory or common law marriage.—*Id.* 571.

LIENS.

1. *Bill to enforce vendor's lien; when lien not shown to have been waived.*—In a bill filed to enforce a vendor's lien, it was averred that certain specifically described lands were conveyed to the defendants upon the recited consideration "of love and affection and the sum of \$600 cash in hand paid;" that the lands were sold under an agreement of sale with the father of the grantees named in said deed and one of the grantees who was not a minor; that the grantees were nieces and nephews of the grantor; that the land so conveyed was worth \$2,000, and the grantor desired to make an advancement to the grantees therein to the extent of \$1400; and that the other part of the purchase money amounting to \$600 was to be paid to the grantor; that evidencing the \$600 notes were given by the father of the grantees and the one of the grantees who was not a minor. *Held*: that the vendor's lien to the extent of \$600 was not lost by reason of the fact of the taking of the note signed by the father of the grantees and the one of the grantees who was not a minor.—*Acree v. Stone*, 156.
2. *Same; proper parties to such bill.*—In such a case the legal title to the lands conveyed by the grantor being in the grantees who were children of one of the makers of the note, such grantees were proper parties defendant to the bill.—*Id.* 156.
3. *Railroad company's demurrage charges for detention of car; lien exists for such charges.*—A railroad company may legally charge car service or demurrage for the detention of its cars by a consignee or consignor beyond a reasonable time in which to unload them or load them, as fixed by rules adopted by the Alabama Car Service Association; and for such demurrage charges the carrier has a lien on the property shipped.—*Sou. Ry. Co. v. Lockwood Mfg. Co.*, 322.
4. *Same; lien not lost by placing car on particular track to be unloaded.* The placing of a loaded car on a particular track by a railroad company for the purpose of allowing the consignee to unload it, is not such an absolute and unconditional delivery unto the assignee of the articles shipped as would cut off or release company's future right of lien on said articles for

LIENS—*Continued.*

- legitimate charges for car service or demurrage that might subsequently accrue, by reason of the consignee's failure to unload the car within the time fixed by the rules of the company or of the car service association.—*Ib.* 322.
5. *Action on the case; when necessary to prove price at which property is sold.*—In an action on the case by a landlord to recover damages for the defendant preventing the enforcement of his lien by removing property subject thereto, where the plaintiff does not show at what price he sold said property, or that any part of the purchase money remains unpaid, but introduces evidence tending to show only the value of the property, plaintiff is not entitled to recover; the evidence so introduced having no tendency to prove plaintiff's loss.—*King v. Henderson*, 460.
 2. *Action for conversion of property; what question for the jury.* In an action to recover damages for the loss and destruction of a lien in favor of the plaintiff by reason of the defendant's removing certain property and converting it to his own use, where the evidence shows that a certain quantity of the property described in the complaint was delivered at certain designated places for the plaintiff, but there was no definite proof as to the weight of the cotton so delivered, it is for the jury to ascertain whether or not such cotton was sufficient to pay the plaintiff, and, therefore, it was error for the court to instruct the jury that the plaintiff should recover the value of all the property so delivered.—*Baker v. Cotney*, 566.

LIMITATION OF ACTIONS.

7. *Action upon a judgment; can be maintained within a year and a day.*—An action can be maintained upon a judgment within a year and a day from its rendition, which is before the expiration of the time after the rendition of the judgment within which an execution could be issued thereto to enforce it. *Kaufman v. Richardson*, 430.

LIMITATIONS, STATUTE OF.

1. *Unlawful detainer; statute of limitation.*—In an action of unlawful detainer, where it is shown that the defendants attorned to the plaintiffs within three years prior to the bringing of the suit, the statute of limitation of three years is not available to the defendant.—*Barnewell v. Stephens*, 609.

MANDAMUS.

1. *Mandamus; not awarded for ordering vacation of chancellor's decree, dismissing a bill in equity.*—Where upon a motion made by some of the defendants in a chancery suit to dismiss the bill for the want of equity, the chancellor renders a decree, granting said motion, and ordering the bill dismissed, the complainant cannot obtain a writ of mandamus, ordering the vacation of said order of dismissal, and the restoration of said defendants as parties to said bill.—*Ex parte Merritt*, 115.

MARRIAGE.

1. *Marriage; when license not properly issued, and does not authorize solemnization of marriage.*—While the statutory duty of a judge of probate to issue marriage licenses is ministerial, it is nevertheless a duty involving official and personal discretion, and cannot be delegated to another not authorized by statute to exercise such duty; and therefore, where marriage licenses are signed in blank by a probate judge, and delivered

MORTGAGES—Continued.

- to a justice of the peace with directions to fill in the blanks as occasion may arise, the issuance of such licenses by the justice of the peace filling in the names of the parties, and date of its issuance does not constitute a valid marriage license, and furnishes no authority for the solemnization of the marriage between the parties named therein.—*Hawkins v. Hawkins*, 571.
- 2 *Same; invalid when without license not followed by co-habitation.*—A marriage solemnized by a justice of the peace without a valid license, and which is not followed by co-habitation, is not valid either as a statutory or common law marriage.—*Ib.* 571.
 3. *Marriage; jurisdiction of chancery court to annul marriage contract; duress.*—Where a party is by duress coerced into entering into marriage and the marriage ceremony is had under the supposed authorization of a marriage license, which license was invalid, and there has never been any co-habitation of the parties as man and wife after the ceremony, the person so coerced to enter into such marriage can maintain a bill to have annulled and declared void such pretended marriage.—*Ib.* 571.

MASTER AND SERVANT.

1. *Defective track conditions; trainmen do not assume risks thereof.* It is not the duty of trainmen but of other employes to see that the track is safe and kept in proper condition, and, therefore, trainmen do not assume the risk of defective track conditions.—*Northern Ala. R. R. Co. v. Shea*, 119.
2. *Liability of employer for acts of employe, below grade of general manager; when employe stands in place of employer.* The rule in Alabama as to the common law liability of the employer for the acts of his employe is that the employer is liable for the performance of those personal, non-delegable duties, which the law holds the employer must attend to himself, and any servant charged with these duties stands in the place of the master.—*A. G. S. R. R. Co. v. Vail*, 134.
3. *Non-delegable duties; sufficiency of force employed to perform task.*—One of the absolute non-delegable duties of the employer is that of seeing that the number of persons employed is sufficient to prevent each of them from being exposed to that class of risks which result from an inadequacy of the force available for the work in hand.—*Ib.* 134.
4. *Same; same; case at bar.*—Where an employe has been delegated by the master with the duty of hiring and discharging servants to perform a particular piece of work, over which said employe is foreman, he is the representative of the master in that matter, and is under obligation to employ sufficient number of servants to do the work.—*Ib.* 134.

MECHANIC'S AND MATERIAL-MAN'S LIEN.

1. *Statutory notice of subcontractor to owner; what money subject.* The owner of a building who advances a contractor on a contract after having received the statutory notice from a subcontractor or material man who has furnished labor or material, is liable to said sub-contractor for such amounts advanced; notwithstanding the amount advanced was to pay for material necessary for the completion of the building.—*McDonald Stone Co. v. Stern & Marx*, 506.
2. *Same; unpaid balance.*—A material man or sub-contractor, who gives notice to the owner of his claim, has a lien upon the unpaid balance due the contractor and upon whatever sum may subsequently become due under the contract.—*Ib.* 506.

MECHANICS AND MATERIAL-MAN'S LIEN—*Continued.*

3. *Same; same.*—The fact that there was held by the owner a sufficient amount under the contract due the contractor after the completion of the building to satisfy the claim of the said contractor, had it not been for the intervention of other lienors, does not excuse the owner from said liability.—*Ib.* 506.

MINORS.

1. *Where minors are interested, guardians ad litem should be appointed.*—In a proceeding to sell lands owned by tenants in common for division, where some of the co-tenants are minors, it is error for the court to render a decree without having the infant defendants represented by a guardian ad litem. *Edwards v. Edwards*, 268.

MORTGAGES.

1. *Bill to redeem under a mortgage; when husband of complainant necessary party.*—Where a bill is filed by a married woman, who claims title by a deed from her husband to have a deed to certain lands executed by her and her husband to a third party declared a mortgage and to have the same annulled on the ground of payment, or to be allowed to redeem, if the mortgage indebtedness is not paid, the husband of the complainant is a necessary and indispensable party to the suit, and the failure to make him a party is fatal to obtaining the relief prayed for; and of this defect the court can take notice *ex mero motu.*—*Marbury L. Co. v. Harriet Posey*, 394.
2. *Action of trover; priority of mortgage.*—Where in an action of trover, the plaintiff claims under a mortgage which was duly recorded, and which was given to secure the repayment of a debt presently contracted, and the defendant claims under a mortgage which was not recorded, and of which the plaintiff had no actual notice, the plaintiff occupies the position as to the defendant of a purchaser for value of the property included in his mortgage, which constitutes a prior lien, and the mortgage given to the defendant, though executed prior to the plaintiff's mortgage, cannot affect plaintiff's right to recover, and the defendant's mortgage is not admissible in evidence.—*Patterson v. Irvin*, 401.
3. *Mortgage; assignment thereof; title does not revert by erasure of assignment.*—Where a mortgage is assigned by the mortgagee endorsing the assignment on the back of such mortgage, which assignment is duly acknowledged before a notary, and subsequently the assignee redelivered the mortgage to the mortgagee, and erased from the assignment endorsed thereon, the name of the assignee, such erasure and delivery of the mortgage does not have the effect to reinvest the title in the mortgagee, but the title remained where the assignment had placed it.—*Carter v. Smith*, 414.
4. *Husband and wife; power of wife to alienate lands, includes power to mortgage.*—The general power of a married woman to alienate her lands with the assent and concurrence of her husband, as conferred by the act approved Feb. 28th, 1887, "To define the rights and liability of the husband and wife," confers upon a married woman the unlimited power of alienation, so far as the character of the conveyance is concerned, and includes the power to execute a mortgage or deed of trust to secure her debts.—*Collier v. Alexander*, 422.
5. *Mistake of officer recording it does not affect rights of mortgagee.*—Where a mortgage is duly filed for record in the office of the Judge of Probate, such filing is, under the provisions of the statute, (Code, 1896, § 987), operative as notice of the mortgagee's lien from the day delivered to the Judge, and a

MORTGAGES—Continued.

mistake of the officer in recording the mortgage does not affect the rights of the mortgagee thereafter, nor render the record of the mortgage ineffective as constructive notice to such subsequent purchasers for value.—*Chapman v. Johnson*, 633.

6. *Mortgage; effect of usury as to bona fide purchaser.*—A stipulation for usurious interest upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a *bona fide* purchaser without notice as to outstanding equities in third parties; and as against such mortgagee, the holders of outstanding equities are entitled to the same measure of relief as they would have been against the mortgagor had not the mortgage been executed.—*Morris v. Bank of Attalla*, 638.
7. *Trover; admissibility in evidence of usury in mortgage debt.* In an action of trover brought by a mortgagee to recover damages for alleged conversion of the property conveyed in the mortgage, where the defendant sets up the defense that he had a lien upon the property in controversy by reason of a mortgage which was executed prior to the mortgage to the plaintiff, but which was not recorded, the fact as to whether the plaintiff's debt secured by the mortgage was tainted with usury, is a material inquiry, and testimony tending to show that there was usury in such debt, should be admitted when offered by defendant.—*Ib.* 638.
8. *Execution of written instrument by making mortgage; not invalid when attesting witness, agent or employee or mortgagee.*—Where in the execution of a mortgage, the mortgagor signs the same by making his mark, the fact that the attesting witness was an agent or employee of the mortgagee, does not render the mortgage invalid.—*Ib.* 638.
9. *Mortgage; stipulation for payment of attorney's fee.*—The provision contained in a mortgage that the proceeds of the sale from the mortgage should be devoted, first, to the payment of the expenses of said sale, "including a reasonable attorney's fee for collecting said sum, whether by foreclosure of under order of sale, or by proceedings in court or otherwise," is sufficient to authorize the allowance of an attorney's fee for filing a bill in equity to foreclose said mortgage.—*Langley v. Andrews*, 655.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, SUB-TITLE.

NEGLIGENCE.

1. *Averment of negligence; sufficiency thereof.*—A count that avers that the train of cars upon which plaintiff was in discharge of his duties as a brakeman was derailed, and plaintiff thereby injured, in consequence of its being run by the engineer at a rate of speed which was dangerous and reckless, contains a sufficient averment of negligence.—*Northern Ala. R. R. Co. v. Shea*, 119.
2. *Action for negligence; sufficiency of complaint; averment of name of party to whose negligence injury is imputed.*—In an action against a railroad corporation by an employee thereof to recover damages for personal injuries, where it is alleged in the complaint that the injury was caused by defects in the track of the defendant, which defect arose from or had not been discovered or remedied owing to defendant's negligence or the negligence of some person entrusted by defendant with duty of seeing that the track was in proper condition, it is not necessary to aver the name of the person so entrusted with such duty.—*Ib.* 119.

NEGLIGENCE—Continued.

3. *Same; liability to passenger transported free.*—Where no charge or compensation is made or to be made, and no compensation is to be exacted, directly or indirectly, for the transport of plaintiff's property, and this is so understood by him at the time, the ferry owners are liable to him only for the consequences of gross negligence.—*Frierson v. Frazier*, 232.
4. *Action for negligence; sufficiency of complaint.*—In an action to recover damages for personal injuries, alleged to have been sustained by reason of the plaintiff's vehicle being run into by one of the defendant's cars, a count of the complaint which avers that the "defendant negligently caused or allowed said train to run upon or against said vehicle or animal, as aforesaid, whereby plaintiff suffered said injuries and damages, as aforesaid," states a substantial cause of action.—*Birmingham Belt Ry. v. Gerganous*, 238.
5. *Same; same.*—In such a case a count of the complaint states a substantial cause of action which, after averring that the defendant's train at the time of the accident, was being run in violation of a city ordinance then avers, said violation of said ordinance consisted in this, viz., Defendant caused, permitted or suffered said locomotive engine to run within the limits of said city at a greater rate of speed than four miles per hour when running back-wards; defendant caused, permitted or suffered said train to run or move in the night time without having a head-light; defendant caused, permitted or suffered said train to run without causing the usual signals to be given continuously by ringing the bell or otherwise.—*Ib.* 238.
6. *Action for negligence; what necessary to recover.*—In an action against a railroad company where a count of the complaint is in trespass involving the affirmative participation of the defendant in causing the injury, and there is no evidence that the defendant directly participated in the negligence complained of in the manner as stated, the defendant is entitled to the general affirmative charge in its favor as to said counts.—*Ib.* 238.
7. *Wanton, wilful or intentional negligence; insufficiency of evidence to support count charging same.*—In an action against a railroad company, the affirmative charge should be given against a count, charging wanton, willful or intentional negligence, where the only evidence tending to support same was that the whistle was not sounded nor the bell rung, as the train approached the crossing near which plaintiff was injured.—*N. C. & St. L. Ry. Co. v. Harris*, 249.
8. *Wilful or wanton injury; what constitutes.*—The rule of law as to wanton or wilful injury, is correctly set forth in the charge, "The court charges the jury that before a party can be said to be guilty of wilful, or wanton conduct, it must be shown that the person charged therewith was conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act, or omitted some known duty which produced the injury.—*Montgomery Street Ry. v. Rice*, 674.

II. CONTRIBUTORY NEGLIGENCE.

9. *Liability of owners of ferry; contributory negligence.*—In an action against ferry boat owners to recover damages for the loss of team backing into the river, where the issue of contributory negligence was involved, with evidence tending to support same, a charge to the jury that "If from the evidence you are reasonably satisfied that the defendant was guilty of negli-

NEGLIGENCE—Continued.

- gence and that such negligence was the direct cause of the injuries complained of, your verdict should be for plaintiff" is improper.—*Frierson v. Frazier*, 232.
10. *Same; contributory negligence; not negligence as a matter of law to alight from a running train in the night time and at a dark and unlighted place.*—It is not negligence as a matter of law for a passenger to alight from a train running two or three miles an hour and at a dark and unlighted place. The question of negligence *vel non* is one of fact for the jury.—*K. C. M. & B. Ry. Co. v. Matthews*, 298.
 11. *Same; same; same.*—Even though so alighting from a moving train might involve some risk to so alight does not as a matter of law constitute negligence; it being a question of fact for the jury whether or not the risk involved was such as a man of ordinary care and prudence would take under the circumstances.—*Ib.*, 298.
 12. *Contributory negligence; attempting to alight from a moving train on the left foot the train moving to the left not negligence as a matter of law.*—It is not negligence as a matter of law for a person to attempt to leave a moving train on his left foot when the train is moving to the left. It is a question of fact for the jury to determine whether or not under such conditions a man of ordinary prudence would have made the attempt.—*Ib.* 298.
 13. *Same; contributory negligence no defense.*—In an action against a common carrier, which is not the initial carrier, for failure to safely deliver goods shipped over its line, a plea which sets up contributory negligence on the part of the plaintiff in that the goods were improperly loaded in the car of the initial carrier by plaintiff, or his agent, presents no defense and is subject to demurrer.—*Walter v. Ala. Gt. Sou. R. R. Co.*, 474.
 14. *Same; same; same; sufficiency of plea.*—In an action against a common carrier for failure to safely deliver goods shipped over its line, a plea which after setting up as a defense the contributory negligence on the part of plaintiff then avers "that the goods were not injured or damaged while in the possession of this defendant" presents a defense, since if the goods were not damaged or injured while in the possession of the defendant there would be no liability on the part of the defendant.—*Ib.* 474.
 15. *Action against street railroad company by passenger; contributory negligence.*—Where a passenger upon a street car steps off the car backwards while it is going at the rate of 5 or 6 miles an hour, or with his face towards the rear of the car, he is guilty of contributory negligence, which precludes his recovery for injuries sustained, by reason of trying in this way to alight from the car.—*Birmingham Ry. L. & P. Co. v. Glover*, 492.
 16. *Contributory negligence; not shown by merely violation of law.* It is not contributory negligence *per se* for a person who is injured to be engaged at the time of the injury in a violation of law; but before an illegal act or omission can be held to be contributory negligence, it must appear that such act or omission was a proximate cause of the injury.—*Ensley Mercantile Co. v. Otwell*, 575.
 17. *Contributory negligence; duty of person approaching track of railway.*—It is the duty of a person approaching the tracks of a railway for the purpose of crossing it: to stop and look, and if necessary, to listen for approaching trains; and where there is an omission of this duty, followed by injury resulting from a collision with a train or locomotive or car, while at-

NEGLIGENCE—Continued.

tempting to cross over the track, the person so injured and so failing to discharge the duty resting upon him is, as a matter of law, guilty of contributory negligence which precludes his recovery of damages in an action which counts upon the simple negligence of the railroad company or its employes. *L. & N. R. Co. v. Pearce*, 680.

NEW TRIALS.

1. *New trial; quotient verdict; when not shown.*—When evidence is introduced tending to show that the verdict in a damage suit is, by pre-agreement of all the jurors arrived at by taking an assessment of damages for the plaintiff as made by each of the jurors, adding these assessments together, and then dividing the total by 12, such verdict is a quotient verdict, and illegal; but if it is shown that such process was resorted to without previous agreement that the result should be the verdict, but was tentative only as affording a basis for a subsequent consideration and discussion by the jury, the verdict thereafter rendered is not a quotient verdict, and is valid and legal.—*Birmingham Ry. L. & P. Co. v. Clemons*, 160.
2. *Motion for new trial; evidence of jurors.*—Where on a motion for a new trial, the verdict rendered is impugned as being a quotient verdict, it is competent for the plaintiff in whose favor the verdict was returned to prove by the jurors themselves in support of their said verdict that it was not arrived at by a process which constituted it a quotient or illegal verdict.—*Id.* 160.
3. *Motion for a new trial on ground that verdict was contrary to evidence.*—Where each count of a complaint is supported by tendencies of the evidence, which make a case, under each, for the determination of the jury, a motion for a new trial on the ground that the verdict was contrary to or not sustained by the evidence, is properly overruled.—*Northern Ala. R. R. Co. v. Shea*, 119.

NOTICE.

1. *Agency; when notice to agent not notice to principal.*—When information is given to an agent upon a casual occasion, when no act or transaction of the agency is pending, and the occasion has no reference to the principal or to his business, such information to the agent is not notice to the plaintiff of the existence of the fact about which it is given.—*Patterson v. Irwin*, 401.
2. *Mistake of officer recording it does not affect rights of mortgagee.*—Where a mortgage is duly filed for record in the office of the Judge of Probate, such filing is, under the provisions of the statute, (Code, 1896, § 987), operative as notice of the mortgagee's lien from the day delivered to the Judge, and a mistake of the officer in recording the mortgage does not affect the rights of the mortgagee thereafter, nor render the record of the mortgage ineffective as constructive notice to such subsequent purchasers for value.—*Chapman v. Johnson*, 633.
3. *What sufficient notice of loss to an insurance company.*—Where a policy of insurance provides that if a fire occur the insured shall give immediate notice of any loss thereby in writing to the company, an allegation that the insurance company had actual notice of the loss within forty-eight hours after the fire is not a sufficient allegation of notice by the insured. *Cont. Ins. Co. v. Parks*, 650.

OFFICE AND OFFICERS.

1. *Sheriff; breach of official bond; sufficiency of complaint.*—In an action against a sheriff and the sureties on his official bond to recover damages for the breach of such bond by the sheriff's failure to execute a writ of *venditioni exponas*, it is necessary that the complaint should aver that the failure to execute such writ was wrongful, negligent, and the like; and in the absence of such averment the complaint is subject to demurrer. *O'Bryan Bros. v. Webb*, 259.
2. *Official bonds; payable and conditioned as required by statute regardless of stipulations in bond.*—A bond intended by the obligor thereon to be the official bond of a public officer, and under which said public officer acts, is, by force of the statute (Code § 3070, 3087, 3089) the official bond of such officer, and in legal contemplation and effect such bond is payable and conditioned as the statute requires the official bond of such officer to be payable and conditioned; and it is, therefore, of no consequence that the bond so executed is payable and conditioned differently from that which the statute requires for official bonds, or that the conditions expressed in the bond may not have been broken by the officer.—*U. S. F. & G. Co. v. Union T. & S. Co.*, 532.
3. *Action upon official bond; sufficiency of plea.*—In an action upon an official bond of a register in chancery to recover money received by such register, and deposited to his credit in a bank, whereby it was lost to the plaintiff by reason of the bank's failure, a plea which sets up as a defense that the sum claimed was received by the register who preceded the defendant in the office and by him deposited in said bank, and that upon the defendant's coming into office, his predecessor gave him a check for said sum upon said bank, which check was placed to the credit of the defendant as register in chancery on the books of said bank, after which time the bank failed, presents no defense to the maintenance of the suit. *Co. v. Shea*, 119.

OVERRULED CASES.

1. *Alabama Fruit Growing & Winery Association v. Garner*, 119 Ala. 70, holding that where a cause is tried without a jury, rulings of the trial judge upon the admissibility of evidence cannot be reviewed unless the bill of exceptions shows what the conclusion and judgment of the courts were, and that exceptions were reserved thereto, overruled by *Morey v. Monk*, 175.
2. *Gregg v. State*, 106 Ala. 44, in so far as it holds that a charge which instructs the jury "that proof of contradictory statements or declarations on a material point, made by the witness, may be sufficient to raise a reasonable doubt in the minds of the jury, as to the truth of the testimony of the witness," overruled by *Brown v. State*, 287.
3. *Williams v. State*, 114 Ala. 19, in so far as it holds that a charge which instructs the jury "that proof of contradictory statements or declarations on a material point made by the witness, may be sufficient to raise a reasonable doubt in the minds of the jury as to the truth of the testimony of the witness," overruled by *Brown v. State*, 287.
4. *Hooper & Nolan v. Birchfield*, 138 Ala. 423, in so far as it holds that a defendant in an action at law, who has an equitable defense of which he is at the time of the trial apprised, should not wait until judgment is rendered in said suit before applying to a court of equity for relief by injunction, overruled by *Humphries v. Adkins*, 517.

PARTNERSHIP.

1. *Fraudulent conveyances; sale of property by partnership.*
Where upon the dissolution of a partnership, it is stipulated in the agreement providing therefor that one of the parties should take the partnership property and pay the partnership debts, and after delivery of the partnership property to him, said partner, so assuming the debt, makes a fraudulent sale of said property, such property, in the hands of the fraudulent vendee, is liable to the payment of the partnership debts, and can be subjected thereto by creditors of the partnership.
Schwarz, R & Co. v. Bailey, 439.
2. *Dissolution of partnership; equity of bill in chancery.*—Where one of the members of a partnership has been excluded from the business of his firm, and the stock of goods owned by the firm has been taken into the possession of the other member of the partnership in collusion with a third party, the partner so excluded can maintain a bill for the dissolution of the partnership.—*Gillett v. Higgins*, 444.
3. *Dissolution of partnership; appointment of receiver.*—Where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled a decree for dissolution, it is proper to appoint a receiver of the partnership's assets in business.—*Ib.* 444.
4. *Same; same.*—Where a bill is filed for the settlement and dissolution of a partnership, and the complainant also asks for the appointment of a receiver, and it is averred that the defendant partner sold out the firm's goods, and turned over the business to strangers, to the utter exclusion of the complainant, and in utter disregard of his rights and interests, there is made out a *prima facie* case for the appointment of a receiver even without notice of the application.—*Ib.*, 444.

PLEADING AND PRACTICE.

1. *Pleading and practice; how exceptions reserved considered on appeal.*—A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted.—*Dickens v. State*, 49.
2. *Pleading and practice; plea in abatement; effect of recital of judgment entry as to joinder of issue.*—Where a prosecution is commenced by an affidavit or complaint, and the record discloses that a plea in abatement was filed to the affidavit, but it does not show any disposition whatever of the plea, and the judgment entry affirmatively shows that issue was joined upon the plea of not guilty, a judgment of guilty against the defendant is not erroneous upon the ground that it fails to respond to the issue presented by the plea in abatement.—*Jackson v. State*, 55.
3. *Pleading and practice; joint cause of action; discontinuance.*
In an action of assumpsit against several defendants, where the complaint counts upon a joint cause of action against all of the defendants, and the record shows that each of the several defendants was served with process, the amendment of the complaint before the introduction of the evidence, by striking out one of the defendants, constitutes a discontinuance of the action against the remaining defendants.—*Evans Marble Co. v. McDonald & Co.*, 130.
4. *Plea of the general issue; right of the plaintiff to maintain suit, cannot be raised under.*—Where the suit is for rent, and the only plea is the general issue, the right of the sole plaintiff, who is shown to be a married woman, resident in the State

PLEADING AND PRACTICE—*Continued.*

of Louisiana, to maintain the suit, cannot be raised. That plea putting in issue only the truth of the allegations of the complaint, and not challenging the right of the plaintiff to maintain the suit, which can only be raised by a plea in abatement.—*Morning Star v. Querens*, 186.

5. *Suit by passenger for failure to carry to destination; what sufficient complaint in.*—Where the suit is by a passenger against a common carrier, a complaint which alleges that the plaintiff purchased a ticket entitling her to transportation as a passenger, from Birmingham to Belle Ellen, and that she took passage on a train running between these points; that before reaching Yolandy, an intermediate station, she was told by the conductor or the flagman on said train, that the car in which she was then riding would not go to Belle Ellen, but would go to Brookwood, and that she must change cars at Yolandy, and a car in front of hers was pointed out by them as the car for Belle Ellen; that acting on such directions she went into the car designated by them, and as a consequence of doing so, she was left in said car on the side track at Yolandy, while the train including the car in which she had previously ridden, went on to Belle Ellen, discloses a good cause of action.—*Robertson v. L. & N. R. R. Co.*, 216.
6. *Same; what complaint need not allege.*—In such a case, the gravamen of the action being, the defendants wrong in leaving the passenger at the intermediate point, instead of carrying her to her destination, so far as the right of recovery is concerned it is immaterial whether the alleged wrongful act of the conductor or flagman was negligently, willfully, knowingly or even maliciously done, and the complaint need not use either of these terms in describing their action.—*Ib.*, 216.
7. *Same; what allegations proper in complaint.*—Though in such a case, the plaintiff is entitled to recover if her failure to reach her destination was caused by any act of the conductor or flagman, she may, for the purpose of fixing the amount of her damages, aver and prove that they acted maliciously, or with circumstances of aggravation.—*Ib.*, 216.
8. *Same; what proper defense in.*—In such case, the general issue is the only proper plea. If defendants wrong had any causal connection with the result complained of, it is of no consequence that the plaintiff could have avoided the result by making other inquiries as to the proper car for her to take, or anything of that sort. The plaintiff had the right to rely implicitly on what the trainmen told her in this connection, and to act accordingly, and consequently there is no room for pleas of contributory negligence.—*Ib.*, 216.
9. *Action for negligence; sufficiency of complaint.*—In an action to recover damages for personal injuries, alleged to have been sustained by reason of the plaintiff's vehicle being run into by one of the defendant's cars, a count of the complaint which avers that the "defendant negligently caused or allowed said train to run upon or against said vehicle or animal, as aforesaid, whereby plaintiff suffered said injuries and damages, as aforesaid," states a substantial cause of action.—*Birmingham Belt R. R. Co. v. Gerganous*, 238.
10. *Same; same.*—In such a case a count of the complaint states a substantial cause of action which, after averring that the defendant's train at the time of the accident, was being run in violation of a city ordinance then avers, said violation of said ordinance consisted in this, viz., Defendant caused, permitted

PLEADING AND PRACTICE—*Continued.*

- or suffered said locomotive engine to run within the limits of said city at a greater rate of speed than four miles per hour when running backwards; defendant caused, permitted or suffered said train to run or move in the night time without having a head-light; defendant caused, permitted or suffered said train to run without causing the usual signals to be given continuously by ringing the bell or otherwise.—*Ib.* 238.
11. *Sheriff; breach of official bond; sufficiency of complaint.*—In an action against a sheriff and the sureties on his official bond to recover damages for the breach of such bond by the sheriffs failure to execute a writ of *venditioni exponas*, it is necessary that the complaint should aver that the failure to execute such writ was wrongful, negligent, and the like; and in the absence of such averment the complaint is subject to demurrer. *O'Bryan Bros. v. Webb*, 259.
 12. *Pleading; what allegations sufficient to show that suit is in representative and not in individual capacity.*—Where the caption of the complaint states the name of the plaintiff as "F. M. administratrix of the estate of W. M. deceased," but the six counts of the complaint as originally filed allege in some that "the plaintiff as administratrix of the estate of W. M." sues, etc., and in others that "the plaintiff, as aforesaid (that is as such administratrix) claims," etc., and said complaint is subsequently amended by adding thereto a 7th count, the plaintiff having moved in her representative capacity for leave of the court to add this count and such leave having been granted to her in that capacity, and the plaintiff alleges in said count that "her intestate" was a passenger, etc., and that "her intestate" was thrown from the train, etc., said count although merely alleging that "the plaintiff claimed of the defendant" the sum sued for, sufficiently shows that said suit is instituted by the plaintiff in her representative capacity and not her individual capacity, and that this is so even though all the other counts in the complaint were either held bad on demurrer, or the general affirmative charge given against them.—*K. C. M. & B. Ry. Co. v. Matthews*, 298.
 13. *Same; for what purposes counts in the complaint charged against are still considered a part of the complaint.*—Counts in a complaint against which the general affirmative charge has been given are still considered in the complaint for all the purposes of showing the capacity in which plaintiff sues. *Ib.* 298.
 14. *Action for personal injuries against common carrier; what allegations in complaint sufficient to state cause of action.*—A count in a complaint for personal injuries resulting in death which alleges that the plaintiff's intestate was a passenger on the railroad of the defendant and that said intestate as such passenger was through and by the carelessness and negligence of the defendant's servants, agents, or employees, violently thrown from the train and so greatly injured, etc., by the injuries thus sustained that he never recovered therefrom but soon after died on account of said injuries, states a cause of action.—*Ib.* 298.
 15. *Same; what defects in complaint not noticed on appeal.*—Although said count does not in terms aver that the injury resulted from the defendant's negligence, nor that the servants from whose negligence the injury is alleged to have resulted, were in charge of the train, or the like, no assign-

PLEADING AND PRACTICE—*Continued.*

- ment of demurrer having specified this objection to the count, said defect will not be noticed on appeal.—*Ib.*, 298.
16. *Same; when not necessary to aver quo modo of the infliction complained of.*—Where the complaint shows the duty of carrier by defendant to intestate and that he was injured by negligence on the part of the carrier's servants for which defendant was responsible an allegation in the complaint that decedent "was violently thrown from the train" is a sufficient allegation of the *quo modo* of the infliction.—*Ib.*, 298.
 17. *Same; when not necessary to describe in complaint the character of injuries suffered by decedent.*—Where the suit is instituted by a personal representative to recover damages for injuries causing the death of her intestate, it is not necessary to describe in the complaint the character of the injuries received by said intestate, it being sufficient to show causal connection between the injuries complained of and the death.—*Ib.*, 298.
 18. *Petition by co-tenant for sale of lands for division should aver petitioner's interest.*—Where a tenant in common files a petition to have the property jointly owned sold for division upon the grounds that it cannot be equitably divided, the petition should set out the interest of the petitioner in said lands, and should pray a distribution of such interest of the proceeds to the petitioner.—*Edwards v. Edwards*, 267.
 19. *Action of assumpsit; sufficiency of complaint.*—In an action by real estate agents to recover commissions, a count of the complaint which claims a specific sum for the breach of an agreement entered into by the defendant, in which the defendant agreed if the plaintiffs "would procure a customer for her for a certain piece of property at the price of \$3,500, that she would pay them a reasonable commission for their services," and then avers that plaintiffs had complied with all the provisions of said agreement, but that the defendant has failed to pay the plaintiffs any sum for such services, states a cause of action, and is not subject to demurrer, upon the ground that it is not alleged in said count that the customer procured for the property mentioned in the complaint was ready, able and willing to pay for the property the sum fixed.—*Lunsford v. Bailey & Howard*, 319.
 20. *Action against railroad company; when no cause of action shown.*—In an action against a railroad company, a complaint does not state a cause of action which charges the defendant with collusion with another railroad company by allowing the latter to run over a branch of the defendant's road, and to use the defendant's road to grade such branch of the road, and thereby enable the other company to reach "plaintiff's possession which was taken by strong force from plaintiff by the other railroad company, and cutting a fence around said possession, exposing the crop," to plaintiff's damage, etc.—*Henry v. N. C. & St. L. Ry.*, 336.
 21. *Pleading and practice; when error in sustaining demurrer to plea without injury.*—Where the facts alleged in a special plea can be introduced in evidence under the plea of the general issue, and it affirmatively appears that the defendant under plea of the general issue had the benefit of the same defense which it sought to interpose by the special plea, the sustaining of a demurrer to such special plea, if erroneous, is error with injury.—*Central of Ga. Ry. v. Larkin*, 375.
 22. *Powers of attorney; reference to same in complaint by book and page thereof, insufficient.*—Where certain powers of attorney are essential to a complaint, the complaint should contain the substance of same with sufficient definiteness to have informed

PLEADING AND PRACTICE—*Continued.*

- the defendant what they contained, and a complaint which merely contains a citation of the date of such powers of attorney, the book wherein they are recorded and page thereof, is subject to demurrer.—*Long v. Mechem*, 405.
23. *Action upon a judgment; sufficiency of complaint.*—In an action upon a judgment, the complaint is sufficient if it sets forth the court by which the judgment was rendered, the place at which the court was held, the names of the parties, plaintiff and defendant, the date of its rendition, and the amount recovered; and it is not necessary in such a complaint to allege any particular reason for bringing the action upon the judgment theretofore recovered, other than that it was unpaid.—*Kaufman v. Richardson*, 430.
24. *Assignment of choses in action; suit may be brought in name of assignee.* The equitable title of an assignee to chose in action will be recognized by courts of law, and suit may be brought in the name of the assignor.—*Snead v. Bell*, 449.
25. *Action against common carrier; sufficiency of complaint.*—In an action against a common carrier to recover damages for failure to safely deliver goods shipped over its lines, a count of the complaint which is substantially in the form prescribed by the Code for suit against a common carrier on a bill of lading, with some additional averments made necessary by the suit being brought against the defendant as a connecting carrier, sufficiently states a cause of action and is not subject to demurrer.—*Walter v. Ala. Gt. Sou. Ry. Co.*, 474.
26. *Same; contributory negligence no defense.*—In an action against a common carrier, which is not the initial carrier, for failure to safely deliver goods shipped over its line, a plea which sets up contributory negligence on the part of the plaintiff in that the goods were improperly loaded in the car of the initial carrier by plaintiff, or his agent, presents no defense and is subject to demurrer.—*Ib.* 474.
27. *Same; same; same; sufficiency of plea.*—In an action against a common carrier for failure to safely deliver goods shipped over its line, a plea which after setting up as a defense the contributory negligence on the part of plaintiff then avers "that the goods were not injured or damaged while in the possession of this defendant" presents a defense, since if the goods were not damaged or injured while in the possession of the defendant there would be no liability on the part of the defendant.—*Ib.* 474.
28. *Same; same.*—In such a suit where there were several connecting carriers and an action is brought against the delivering carrier, a plea which avers that the car in which plaintiff's goods were transported was received by defendant from a connecting carrier and was closed and sealed and so remained from the time of its delivery to defendant until it was delivered to plaintiff, and that the contents of the said car could not be seen by defendant without its breaking the seal and opening the car, and that the contents of the car was not visible or known to defendant when it was received from the connecting carrier, and that defendant hauled said carload of goods from the place where it was delivered to defendant to its place of destination in the same condition in which it was received, and delivered same to plaintiff in such condition, and that if said goods were damaged as alleged in the complaint it was not through the fault or negligence of the defendant, and is not subject to demurrer.—*Ib.* 474.

PLEADING AND PRACTICE—*Continued.*

29. *Action by passenger for personal injuries; sufficiency of complaint.*—In a suit brought by a passenger against a street railroad company to recover damages for personal injuries, a count of the complaint which avers that "defendant was negligently operating said car at or near a point on defendant's line * * * that while plaintiff was engaged in or about to alight from said car, his body, as a proximate consequence of said negligence, was caused to leave said car and strike the street with great force and violence, whereby plaintiff was bruised," states a cause of action.—*Birmingham Ry. L. & P. Co. v. Glover*, 492.
30. *Same; same.*—In such an action a count of the complaint which avers that the plaintiff "had informed the defendant's servant, the conductor or motorman of said car, of his purpose and desire to alight from said car * * * , that it was and then became the duty of defendant's servant, after slackening and reducing the speed of said car, not to increase the speed of said car, until plaintiff had alighted from said car, or had had a reasonable opportunity to alight from said car; that, notwithstanding said duty, the defendant's servant negligently, suddenly and greatly increased the speed of said car before plaintiff had alighted therefrom, and before plaintiff had had a reasonable opportunity to alight therefrom; that as a proximate consequence of said negligence," plaintiff suffered the injuries complained of,—is faulty in assuming instead of alleging that defendant's servant slackened the speed of the car, upon being informed that the plaintiff desired to alight therefrom, and in not alleging that it was the duty of defendant's servant to decrease the speed then and there; but said count is not subject to demurrer upon the ground that it does not appear therefrom that at the time of the increase of the speed of the car, the plaintiff was in the act of alighting therefrom, and said complaint states a cause of action.—*Id.* 492.
31. *Same; same; when count does not charge willfulness, wantonness or recklessness.*—In such a case where a count of the complaint, after stating that plaintiff was a passenger, and that there was duty on the part of defendant's servant to plaintiff not to increase the speed of the car after being advised that plaintiff desired the car stopped that he might alight, then alleges that "the said motorman, the defendant well knowing that plaintiff was seeking to alight, and well knowing that a sudden jerk would probably throw plaintiff from the car, with wanton and willful, or reckless negligence, suddenly increased the speed of said car, and as a proximate consequence thereof," plaintiff was thrown from the car and injured, such count of the complaint does not aver that the motorman wantonly, willfully or recklessly caused plaintiff's fall, and therefore pleas of contributory negligence on the part of plaintiff set up a defense to such count.—*Id.* 492.
32. *Same; same; same.*—Such count is inapt, if not affirmatively bad as one alleging willful injury inflicted by the motorman in that it avers not that the motorman had knowledge of the probable disastrous consequence of his act, but that the "defendant" had such knowledge; and the knowledge of the defendant in its corporate capacity, is not sufficient to characterize the act of the plaintiff on the part of the motorman as being willful.—*Id.* 492.
33. *Pleading and practice; how assignment of error upon pleadings considered on appeal.*—When an assignment of error, based upon the ruling of a trial court, upon demurrers to two separate pleas, is made by a single assignment, it is unavailing

PLEADING AND PRACTICE—*Continued.*

- to work a reversal of the judgment, unless there was error in the ruling upon the demurre to each of the pleas.—*Seaboard Air Line v. Hubbard*, 546.
34. *Pleading and practice; variance cannot be raised first time on appeal.*—A question of variance between the allegations of a complaint and the testimony introduced at the trial of a case cannot be raised for the first time on appeal.—*Ensley Merc. Co. v. Otwell*, 575.
35. *Action upon official bond; sufficiency of plea.*—In an action upon an official bond of a register in chancery to recover money received by such register, and deposited to his credit in a bank, whereby it was lost to the plaintiff by reason of the bank's failure, a plea which sets up as a defense that the sum claimed was received by the register who preceded the defendant in the office and by him deposited in said bank, and that upon the defendant's coming into office, his predecessor gave him a check for said sum upon said bank, which check was placed to the credit of the defendant as register in chancery on the books of said bank, after which time the bank failed, presents no defense to the maintenance of the suit. *Parkes v. Bryant*, 627.
36. *Pleading and practice; what plea insufficient.*—A plea filed to a complaint upon a fire insurance policy which merely alleges that the plaintiff ought not to recover in the action upon the contract sued on by reason of anything alleged in the complaint is demurrable because it neither denies nor confesses and avoids the allegations of the complaint.—*Cont. Ins. Co. v. Parks*, 650.
37. *Same; same; pleas alleging conclusions of law and not statement of facts.*—In an action upon a fire insurance policy a plea alleging that in and by the terms of the policy it is provided that the contract may be cancelled, and that in accordance with the terms of the policy in regard to cancellation the said policy was cancelled by the defendant before the loss occurred, merely alleges the conclusions of the pleader and is demurrable for failing to set out the terms of the policy sued on so that the court could determine the right of defendant to cancel and thereby terminate its liability thereon.—*Ib.* 650.
38. *Same; same.*—A plea alleging that defendant did not issue any policy to plaintiff but that it did issue one to plaintiff's husband which subsequently was cancelled and surrendered is a plea of *non est factum* and must be sworn to.—*Ib.* 650.
39. *Same; same; when plea insufficiently alleges notice to assured of intention to cancel policy.*—In an action upon a fire insurance policy one of defendant's pleas alleged that the policy was originally issued to the husband of the plaintiff and loss if any, was made payable to R. M. as mortgagee as his interest might appear. That afterwards said R. M. returned said policy to defendant's agent and had same changed so that plaintiff became the assured and J. M., the wife of the said R. M., was named as mortgagee and loss, if any, made payable to her as such mortgagee as her interest might appear, and that the said J. M. then took possession of said policy and it was not thereafter in the possession of the plaintiff. That by the terms of said policy defendant on notice for the space of five days had the right to cancel said policy and that subsequently said defendant did give notice to the said J. M. that it would cancel said policy and the said J. M. thereupon surrendered said policy to the defendant and the same was cancelled by

PLEADING AND PRACTICE—Continued.

defendant before the loss occurred. Held: that said plea is fatally defective in failing to show notice to the assured of defendant's intention to cancel the policy. Held further, that notice to the mortgagee would not be sufficient notice to entitle defendant to cancel, but such notice must have been to assured.—*Ib.* 650.

40. *Pleading; counts ex delicto and ex contractu cannot be joined in the same complaint.*—A count for deceit in the sale of merchandise cannot be joined with a count for the breach of a contract of sale.—*Romano v. Brooks*, 514.

POWER OF ATTORNEY.

1. *Powers of attorney; reference to same in complaint by book and page thereof, insufficient.*—Where certain powers of attorney are essential to a complaint, the complaint should contain the substance of same with sufficient definiteness to have informed the defendant what they contained, and a complaint which merely contains a citation of the date of such powers of attorney, the book wherein they are recorded and page thereof, is subject to demurrer.—*Long v. Mechem*, 405.

PROBATE, JUDGE OF.

1. *Term of office of Judge of Probate not effected by the General Election Law of 1903.*—The "Act to further regulate elections in the State of Alabama," approved October 9, 1903, (Acts 1903, p. 438), did not extend the terms of office of the Probate Judges then in office for an additional year; and under the provisions of said Act a Judge of Probate whose term of office commenced November 3, 1898, could not hold said office longer than a reasonable time after the expiration of his term of November 3, 1904, and until his successor was elected on November 8, 1904, could qualify.—*Prowell v. State ex rel. Hasty*, 80.

PROMISSORY NOTES.

1. *Promissory note; discharge of surety by extension of time to principal.*—An extension of the date of payment of a promissory note granted by the owner of the note to the principal and founded on a valuable consideration, discharges the surety, if made without his knowledge and consent; but a plea by a surety which sets up such discharge is subject to demurrer if it contains no averment that the agreement between the owner of the note and the principal debtor to extend the time of payment was supported by a valuable consideration.—*Lehnert v. Lewey*, 149.
2. *Action upon promissory note; material alteration avoids contract; evidence.*—An alteration which makes a promissory note speak a language different in legal effect from that which it originally spoke, is material, and when made by one not a stranger to the paper, is sufficient to avoid the contract as to all parties not consenting thereto; and in an action upon such note, under issues properly presented, evidence tending to show such material alteration is admissible.—*Carroll v. Warren*, 398.
3. *Action upon a note; failure of consideration; general affirmative charge.*—In an action upon a promissory note, where the defendant pleads a failure of consideration, to which special plea the plaintiff files a special replication, and there was evidence supporting the plea setting up a failure of consideration, and there was no evidence introduced by the plaintiff

PROMISSORY NOTES—*Continued.*

to prove the material affirmance of his replication, the defendant is entitled to the general affirmative charge, and it is not error for the court to give such charge at defendant's request.—*Ib.* 398.

4. *Insanity; endorsement of promissory note by payee who is insane, void, and confers no right upon endorser.*—The endorsement of a promissory note by the payee therein who is insane, is void and confers no right upon the endorser; and in an action by the endorsee upon a note so endorsed against the maker thereof, the insanity of the payee and endorser at the time of the endorsement and transfer, is a valid defense and can be interposed by the maker.—*Walker v. Winn, Jr., Admr.*, 560.
5. *Action upon promissory note; insanity; admissibility of evidence.* Where in an action upon a promissory note by an endorsee of said note, the defendant files a sworn plea, denying that the plaintiff was the party really interested in the note sued on, evidence that the payee of the note was insane at the time he transferred it, is competent and admissible, and it is error for the court to exclude such evidence.—*Ib.* 560.

QUO WARRANTO.

- 1 *Quo warranto; does not lie to prevent threatened exercise of a franchise unlawfully.*—The statutory proceeding in the nature of *quo warranto*, as provided by chapter 94 of the Code of 1896, (p.966) does not lie to prevent the threatened usurpation of an office, or the threatened exercise of a franchise unlawfully.—*State ex rel. Johnson v. Mayor and Council of Ensley*, 661.

RAILROADS.

1. *Averment of negligence; sufficiency thereof.*—A count that avers that the train of cars upon which plaintiff was in discharge of his duties as a brakeman was derailed, and plaintiff thereby injured, in consequence of its being run by the engineer at a rate of speed which was dangerous and reckless, contains a sufficient averment of negligence.—*Northern Ala. R. R. Co. v. Shea*, 119.
2. *Action for negligence; sufficiency of complaint; averment of name of party to whose negligence injury is imputed.*—In an action against a railroad corporation by an employee thereof to recover damages for personal injuries, where it is alleged in the complaint that the injury was caused by defects in the track of the defendant, which defect arose from or had not been discovered or remedied owing to defendant's negligence or the negligence of some person entrusted by defendant with duty of seeing that the track was in proper condition, it is not necessary to aver the name of the person so entrusted with such duty.—*Ib.* 119.
3. *Same; same; same; plaintiff need not aver that he had made diligent effort to ascertain negligent engineer's full name.*—A count alleging that plaintiff's injuries were caused by the negligence of ——— Gould, whose given name is unknown to plaintiff and who was the engineer in charge of the locomotive pulling the train, upon which plaintiff was employed as brakeman, and that said engineer so negligently and carelessly managed his engine as to throw some of the cars from the track, resulting in the injury to plaintiff, sufficiently charges negligence; and it in effect avers the surname of the engineer and that his christian name is unknown to

RAILROADS—*Continued.*

- the plaintiff. It is not necessary for plaintiff to aver that he had made diligent effort to ascertain the engineer's full name, but had failed to ascertain it.—*Ib.* 119.
4. *Expert testimony; competency to testify as to condition of railroad track.*—A witness who is shown to be skilled and experienced in respect of track conditions and track constructions, is competent to give opinions as to the defective and unsafe condition of a railroad track.—*Ib.* 119.
 5. *Same; case at bar.*—A witness who had had long experience as a brakeman, whose duties had to do with the regulation of the speed of the train under the varying circumstances incident to a railway, according to curve, grade, etc., is qualified to give his opinion on each of these matters, and to state that a train, at a particular time and place, was running at a dangerously high speed.—*Ib.* 119.
 6. *Proof of averment in complaint; common knowledge of jury.* An averment in a complaint that "the rails were insecurely fastened to the cross ties" is sufficiently proved, if the evidence shows that ties were rotten, the jurors common knowledge being sufficient to afford them necessary assurance that rotten wood will not hold a rail or spike.—*Ib.* 119.
 7. *Defective track conditions; trainmen do not assume risks thereof.* It is not the duty of trainmen but of other employes to see that the track is safe and kept in proper condition, and, therefore, trainmen do not assume the risk of defective track conditions.—*Ib.* 119.
 8. *Wanton, wilful or intentional negligence; insufficiency of evidence to support count charging same.*—In an action against a railroad company, the affirmative charge should be given against a count, charging wanton, willful or intentional negligence, where the only evidence tending to support same was that the whistle was not sounded nor the bell rung, as the train approached the crossing near which plaintiff was injured.—*N. C. & St. L. Ry. Co. v. Harris*, 249.
 9. *Trespass upon railroad track; when child incapable, by reason of tender age, of exercising discretion, may commit.*—A child incapable, by reason of tender age, from exercising discretion may become a trespasser upon the same facts that would impress that character upon a person of legal discretion, and this is true, although the child would be incapable of contributory negligence.—*Ib.* 249.
 10. *Same; same; case at bar.*—Where a little child nineteen months old came on the track at the crossing, and, seeing the train, turned up the track, went several feet away from the crossing, stopped and stood gazing at the approaching engine, she became a trespasser on the railroad company's track.—*Ib.* 249.
 11. *Same; duty of railroad company.*—A railroad company owes no duty to a trespasser upon its track other than to resort to all reasonable means to avoid injuring such trespasser after its servants become aware of the trespasser's presence and peril.—*Ib.* 249.
 12. *Failure to give statutory signal at railroad crossing; effect in case of injury to trespasser.*—Where a little child in the act of crossing a railroad track, on the approach of an engine, which had failed to give the statutory signal, turned up the track, approached the engine and thereby became a trespasser, the railroad company is liable for injuries sustained if it be shown that the child would not have entered upon the crossing had the signal been given.—*Ib.* 249.
 13. *Same; same.*—Where it is shown that the trespasser would not have heeded the signals if given, failure to give same does not render a railroad company liable for injuries to such trespasser.—*Ib.* 249.

RAILROADS—Continued.

14. *Railroad company's demurrage charges for detention of car; lien exists for such charges.*—A railroad company may legally charge car service or demurrage for the detention of its cars by a consignee or consignor beyond a reasonable time in which to unload them or load them, as fixed by rules adopted by the Alabama Car Service Association; and for such demurrage charges the carrier has a lien on the property shipped.—*Sou. Ry. Co. v. Lockwood Mfg. Co.*, 322.
15. *Same; lien not lost by placing car on particular track to be unloaded.* The placing of a loaded car on a particular track by a railroad company for the purpose of allowing the consignee to unload it, is not such an absolute and unconditional delivery unto the assignee of the articles shipped as would cut off or release company's future right of lien on said articles for legitimate charges for car service or demurrage that might subsequently accrue, by reason of the consignee's failure to unload the car within the time fixed by the rules of the company or of the car service association.—*Id.* 322.
16. *Action against railway company; when no cause of action shown.*—In an action against a railroad company, a complaint does not state a cause of action with charges the defendant with collusion with another railroad company by allowing the latter to run over a branch of the defendant's road, and to use the defendant's road to grade such branch of the road, and thereby enable the other company to reach "plaintiff's possession which was taken by strong force from plaintiff by the other railroad company, and cutting a fence around said possession, exposing the crop," to plaintiff's damage, etc. *Henry v. N., C. & St. L. Ry.* 336.
17. *Action of railroad company as warehouseman; admissibility of evidence.*—In an action against a railroad company as a warehouseman, the distance which the plaintiff lives from the depot of the defendant where the goods were stored, is irrelevant to any issue involved, and therefore testimony as to such fact is inadmissible.—*Sou. Ry. Co. v. Aldridge & Shelton*, 368.
18. *Action against railroad company for killing stock; general affirmative charge.*—In an action against a railroad company to recover damages for the killing of two mules, where there is evidence from which the jury can infer that the employees of the defendant might have discovered the mules in time to have prevented the killing of them, by employing the proper means therefor, and that said employees were negligent in not averting the accident, the general affirmative charge requested by the defendant is properly refused.—*Central of Ga. v. Larkins*, 377.
19. *Action against railroad company for breach of contract of affreightment, admissible in evidence.*—In an action against a railroad company to recover damages for the breach of a contract of affreightment, a statement and a certificate made by the conductor of the defendant relating to a transaction that was past, having reference to the freight shipped over the defendant's line, is not admissible in evidence over the defendant's objection.—*Seaboard Air Line v. Hubbard*, 546.
20. *Contributory negligence; duty of person approaching track of railway.*—It is the duty of a person approaching the tracks of a railway for the purpose of crossing it, to stop and look, and if necessary, to listen for approaching trains; and where there is an omission of this duty, followed by injury resulting from a collision with a train or locomotive or car, while attempting to cross over the track, the person so injured and

RAILROADS—Continued.

so failing to discharge the duty resting upon him is, as a matter of law, guilty of contributory negligence which precludes his recovery of damages in an action which counts upon the simple negligence of the railroad company or its employees. *L. & N. R. R. Co. v. Pearce*, 680.

II. STREET RAILROADS.

21. *Action by passenger against street railway; evidence of number of passengers on car, when admissible.*—In an action by a passenger against a street railway a count in a complaint which ascribed plaintiff's injuries to the "wanton and reckless negligence" of defendant's employees in charge of the car on which plaintiff was a passenger, in that they caused the car to approach and cross a railroad track without stopping, knowing that a train was approaching on such track and that it would probably cross defendant's track without stopping and that there would be a collision between the train and the car and that the probable result of the collision would be injury to the passengers on the car, evidence that the street car was at the time crowded with passengers, was pertinent as supporting the alleged probability and the employer's appreciation of it that passengers would be injured by the collision.—*Birmingham Ry., L. & P. Co. v. Rutledge*, 195.
22. *Same; rate of speed; when question for jury.*—In an action against a street railway company to recover damages for injury to a mule, alleged in the complaint to have been caused by the willful or wanton negligence of the defendant, where the evidence shows that the accident occurred at the intersection of two streets where the mule could not have been seen by the motorman until the car had reached the crossing, the question as to whether running the car at the rate of 5, 6 or 7 miles an hour at such place was wilful or wanton negligence, is a question for the jury.—*Id.*, 674.
23. *Action by passenger for personal injuries; sufficiency of complaint.*—In a suit brought by a passenger against a street railroad company to recover damages for personal injuries, a count of the complaint which avers that "defendant was negligently operating said car at or near a point on defendant's line. * * * that while plaintiff was engaged in or about to alight from said car, his body, as a proximate consequence, of said negligence, was caused to leave said car and strike the street with great force and violence, whereby plaintiff was bruised," states a cause of action.—*Birmingham Railway Light & Power Co. v. Glover*, 492.
24. *Same; same.*—In such an action a count of the complaint which avers that the plaintiff "had informed the defendant's servant, the conductor or motorman of said car, of his purpose and desire to alight from said car * * * , that it was and then became the duty of defendant's servant, after slackening and reducing the speed of said car, not to increase the speed of said car until plaintiff had alighted from said car, or had had a reasonable opportunity to alight from said car; that, notwithstanding said duty, the defendant's servant negligently, suddenly and greatly increased the speed of said car before plaintiff had alighted therefrom, and before plaintiff had had a reasonable opportunity to alight therefrom; that as a proximate consequence of said negligence," plaintiff suffered the injuries complained of,—is faulty in assuming instead of alleging that defendant's servant slackened the speed of the car, upon being informed that the plaintiff desired to

RAILROADS—Continued.

- alight therefrom, and in not alleging that it was the duty of defendant's servant to decrease the speed then and there; but said count is not subject to demurrer upon the ground that it does not appear therefrom that at the time of the increase of the speed of the car, the plaintiff was in the act of alighting therefrom, and said complaint states a cause of action.—*Ib.* 492.
25. *Same; same; when count does not charge wilfulness, wantonness or recklessness.*—In such a case where a count of the complaint, after stating that plaintiff was a passenger, and that there was duty on the part of defendant's servant to plaintiff not to increase the speed of the car after being advised that plaintiff desired the car stopped that he might alight, then alleges that "the said motorman, the defendant well knowing that plaintiff was seeking to alight, and well knowing that a sudden jerk would probably throw plaintiff from the car, with wanton and willful or reckless negligence, suddenly increased the speed of said car, and as a proximate consequence thereof," plaintiff was thrown from the car and injured, such count of the complaint does not aver that the motorman wantonly, willfully or recklessly caused plaintiff's fall, and therefore pleas of contributory negligence on the part of plaintiff set up a defense to such count.—*Ib.* 492.
26. *Same; same; same.*—Such count is inapt, if not affirmatively bad as one alleging willful injury inflicted by the motorman in that it avers not that the motorman had knowledge of the probable disastrous consequence of his act, but that the "defendant" had such knowledge; and the knowledge of the defendant in its corporate capacity, is not sufficient to characterize, the act of the plaintiff on the part of the motorman as being willful.—*Ib.* 492.
27. *Action against street railroad company by passenger; contributory negligence.*—Where a passenger upon a street car steps off the car backwards while it is going at the rate of 5 or 6 miles an hour, or with his face towards the rear of the car, he is guilty of contributory negligence, which precludes his recovery for injuries sustained, by reason of trying in this way to alight from the car.—*Ib.* 492.

RATIFICATION.

1. *Same; duress; ratification.*—A contract made under duress is only voidable and, therefore, the party upon whom duress has been imposed subsequently recognizes the validity of the contract involved, either by making payments thereon or otherwise, he will be held to have elected to waive the duress and ratify the contract.—*Langley v. Andrews*, 655.

RECEIVERS.

SEE CHANCERY, SUB-TITLE.

REDEMPTION.

1. *Bill to redeem under a mortgage; when husband of complainant necessary party.*—Where a bill is filed by a married woman, who claims title by a deed from her husband to have a deed to certain lands executed by her and her husband to a third party declared a mortgage and to have the same annulled on the ground of payment, or to be allowed to redeem, if the mortgage indebtedness is not paid, the husband of the complainant is a necessary and indispensable party to the suit,

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and the failure to make him a party is fatal to obtaining the relief prayed for; and of this defect the court can take notice *ex mero motu*.—*Marbury L. Co. v. Harriet Posey*, 394.

2. *Redemption; right personal, and will be as required by statute.* The right of redemption, as given by the Statute, is a personal privilege, and in order for one to avail himself thereof, it must be shown that he has not failed to do what the law requires in order to invest himself with the right which he seeks to enforce; or he must show some valid reason for his failure therein in any particular.—*Francis v. White, Admr.*, 590.
3. *Redemption; tender of purchase money and lawful charges; excused when purchaser absent from the State.*—Where one seeks to exercise the right of statutory redemption, and the purchaser at the mortgage or execution sale is absent from the State, a tender, to be sufficient to authorize the maintenance of a bill in equity for redemption, must be made by a deposit of the money in court upon the filing of the bill; and the absence of the purchaser or his vendee from the State excuses the tender in person and authorizes the filing of the bill. *Ib.* 590.
4. *Same; when failure to deliver possession no bar to redemption.* Where property is purchased at a foreclosure sale of a mortgage, or under an execution levied thereon, and the purchaser at said sale makes no demand for the possession of the property, such failure to demand possession constitutes a valid reason for former owner failing to deliver possession to the purchaser; and, under such circumstances, the failure to deliver possession constitutes no bar to the exercise of the right to statutory redemption.—*Ib.* 590.
5. *Bill to redeem; when statutory requirements sufficiently complied with.*—In a bill filed to redeem lands from a sale under an execution, where it is averred that the purchaser has absented himself from the State, that the complainant has made diligent inquiry to ascertain his post office address, has repeatedly written to him asking for an account of the lawful charges claimed by him to have been paid, has requested his vendees to inform him what lawful charges are claimed by them; and that the original purchaser and his vendees has each refused to give any information; and that the complainant has made diligent inquiry as to the lawful charges, and has paid into court the amount of all lawful charges he has been able to ascertain, and offers to pay all other lawful charges which may be ascertained by the court: such averments show a sufficient excuse for failure of the complainant to pay the lawful charges, and authorize the maintenance of a bill to redeem.—*Ib.* 590.
6. *Bill to redeem; sufficiency of averments as to tender of lawful charges.*—On a bill to redeem property sold under execution, where it is averred that the complainant has ascertained that the purchaser at said sale had paid designated amount as a tax levied by the city wherein the property was located, which said amount "is herewith tendered and offered to said defendant, as well as the further sum of \$41.76, legal interest on the amount of said assessment," such averment of tender is not sufficient: in that, it fails to aver that the amount is paid into court—it appearing that the purchaser is absent from the State. *Ib.* 590.
7. *Statutory right of redemption; where lands are purchased by several parties, tender not required to be made to each of the purchasers.*—Where property is sold under execution, and the

REDEMPTION—*Continued.*

purchaser at said sale subsequently sells separate portions of said property to two or more other parties, in order for the original owner to redeem the lands so sold, it is not necessary that he should make a tender of the purchase price, together with the other charges fixed by the Statute, to the original purchaser and each of his vendees; but, under such circumstances, the defendant, by redemption, can come into equity by paying into Court the money which the law requires, and ask the Court to distribute it to the parties according to their respective interests and rights, and offer to do and pay whatever more additional thereto may be just and equitable; and upon such averments and offer, he can maintain a bill to redeem.—*Id.* 590.

8. *A bill to redeem; sufficiency of offer to pay for execution of deed.* Where a bill is filed in a court of equity seeking to redeem lands sold under execution, and the complainant offers to pay all lawful charges and asks for information as to their amount, the cost of executing a deed will be considered as included in complainant's offer to do equity.—*Id.* 590.

REGISTRATION OF CONVEYANCES.

1. *Mistake of officer recording it does not affect rights of mortgagee.*—Where a mortgage is duly filed for record in the office of the Judge of Probate, such filing is, under the provisions of the statute, (Code, 1896, § 987), operative as notice of the mortgagee's lien from the day delivered to the Judge, and a mistake of the officer in recording the mortgage does not affect the rights of the mortgagee thereafter, nor render the record of the mortgage ineffective as constructive notice to such subsequent purchasers for value.—*Chapman v. Johnson*, 633.

RES ADJUDICATA.

1. *Husband and wife; res adjudicata as to mortgage being given to secure husband's debt.*—Where in a suit in equity one of the issues involved is whether a mortgage executed by a married woman, conveying her separate property, was given to secure the debt of her husband, and in the decree rendered it was ascertained that said mortgage was not given to secure the husband's debt, such question becomes *res adjudicata* as between the mortgagor and persons claiming under the mortgage; and the fact that such decree was appealed from and was pending at the time of an action of ejectment for the lands included in the mortgage, but was not superseded, does not authorize the introduction in the ejectment suit of evidence touching the issue as to whether the mortgage was given to secure the husband's debt, which was adjudicated by the decree in the chancery court; but a record of the proceedings in said chancery suit is admissible in evidence.—*Collier v. Alexander*, 422.

RESCISSION.

See CONTRACTS.

SALES.

1. *Conditional sale; when shown to exist.*—Where an agreement of purchase of personal property, after reciting that the property was purchased at a certain price, which was to be paid, part in cash and for the balance notes were given, then recites that

SALES—*Continued.*

- if the purchaser failed to pay either of said notes when due, the seller may retake the property sold and all payments thereon shall be retained as rent, and that the title to said property is retained by the seller until full compliance with the terms of said agreement, such agreement constitutes a conditional sale, and the seller is not divested of title until there is a payment of the purchase price.—*Bronson v. Russell*, 360.
2. *Action on the case; when necessary to prove price at which property is sold.*—In an action on the case by a landlord to recover damages for the defendant preventing the enforcement of his lien by removing property subject thereto, where the plaintiff does not show at what price he sold said property, or that any part of the purchase money remains unpaid, but introduces evidence tending to show only the value of the property, plaintiff is not entitled to recover; the evidence so introduced having no tendency to prove plaintiff's loss.—*King v. Henderson*, 460.
 3. *Contract of sale; right of rescission.*—Whereby the fraudulent representation of a vendor in relation to material facts concerning the title of land, the falsity of which he has not the means of ascertaining and could not ascertain by reasonable diligence, one is induced to invest his money in the purchase of land, the purchaser can by bill in equity rescind the sale, and have the contract of purchase annulled.—*Rarden v. Badham*, 500.
 4. *Same; same.*—If the vendor of lands falsely represents his title to be good, when it is not, and the purchaser relying on such representation, is thereby induced to enter into a contract to purchase said land, such misrepresentation, though made under an honest mistake as to the sufficiency of the title, entitles the purchaser to have the contract rescinded.—*Ib.* 500.
 5. *Sale of lands by register; when properly set aside.*—Where lands are sold by the register in chancery under order of the court, and upon exceptions to the confirmation of the sale, and on application to have the sale set aside and a new sale ordered, it is made to appear that a much larger price will be paid for the property on a resale, and such price is guaranteed by a deposit of money with the register, and there is evidence tending to show the inadequacy of the price paid at the sale by the register, the chancellor does not err in refusing to confirm such sale and in setting it aside.—*Montague v. International Trust Co.*, 544.

SHERIFFS.

1. *Sheriff; duty and liability after levy of attachment.*—While it is the duty of a sheriff, who has the custody of property under the levy of an attachment, to preserve it and keep it safely, he is not an insurer of the property against fire; and it is incumbent upon him only to use that reasonable care and diligence in keeping such property, which a man of ordinary discretion and judgment might reasonably be expected to use in reference to his own property; and if while in the exercise of such care, the property is destroyed by fire, while in his custody, the sheriff is not liable for a breach of his official bond.—*O'Bryan Bros. v. Webb*, 259.
2. *Sheriff; breach of official bond; sufficiency of complaint.*—In an action against a sheriff and the sureties on his official bond to recover damages for the breach of such bond by the sheriff's failure to execute a writ of *venditioni exponas*, it is necessary

SHERIFFS—*Continued.*

that the complaint should aver that the failure to execute such writ was wrongful, negligent, and the like; and in the absence of such averment the complaint is subject to demurrer. *Ib.* 259.

STATUTES.

1. *Constitutional law; act creating 14th Judicial Circuit local law and unconstitutional.*—The act of the Legislature, approved March 6, 1903, "to create the 14th Judicial Circuit of the State of Alabama, and fix the time of holding court therein," etc., (Acts 1903, p. 88), is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply to the Legislature for the passage of such law not having been given as provided by section 106 of the Constitution, such law is unconstitutional and void.—*Walker v. State*, 7.
2. *Constitutional law; statute to regulate practice and procedure in the Circuit Court of Clay county unconstitutional.*—The provisions of the Act approved December 13th, 1898, "To further regulate the practice and procedure of the Circuit Court of Clay county," whereby it was intended to deprive that court of jurisdiction to try indictments thereafter returned into that court, and to deprive that court of a grand jury except when the same should be ordered by the judge of said court prior to the convening of said court (Local Acts 1898-99 p. 196), are violative of Section 5 of Article VI. of the Constitution of 1875 (Constitution 1901, § 143) and are therefore inoperative and void.—*Adcock v. State*, 30.
3. *Constitutional law; engaging in business of emigrant agent without obtaining license.*—The Act of the Legislature, approved October 1, 1903, "to prohibit emigrant agents from plying their vocation within the State without first obtaining a license therefor," is not violative of the 14th amendment of the Constitution of the United States, or of section 31 of the Constitution of Alabama; and said act is, therefore, valid.—*Kendrick v. State*, 45.
4. *Construction of act creating city court of Gadsden; rule of practice on appeal; trial by court without jury.*—Under the statute creating and establishing the city court of Gadsden (Acts 1900-01, p. 1298), providing that where a cause is tried by the court without a jury "either party may, by bill of exceptions, also present for review the conclusions and judgment of the court on the evidence," etc., the appellate court can not review the correctness of the conclusion and judgment of the court upon the evidence, unless it is disclosed in the bill of exceptions that an exception was reserved thereto.—*Fleming v. State*, 52.
5. *Indictment for abandoning family; wife competent witness.*—The statute making the wife a competent witness against her husband under an indictment for abandoning his family (Acts 1903, p. 32), is not an *ex post facto* law within the meaning of the constitutional provision.—*Wester v. State*, 56.
6. *Act creating Houston County; notice of intention to apply for the passage of the law creating said county sufficient.*—The notice given of the intention to apply to the Legislature of the State of Alabama of 1903, for the passage of a law creating a new county out of portions of Henry, Dale and Geneva Counties, was sufficient under Section 106 of the Constitution, and was not subject to constitutional objections, because it failed to state the boundaries of the new county, as defined and fixed in the act.—*Law v. State*, 62.

STATUTES—Continued.

- 7 *Term of office of Judge of Probate not affected by the General Election Law of 1903.*—The "Act to further regulate elections in the State of Alabama," approved October 9, 1903, (Acts 1903, p. 438), did not extend the terms of office of the Probate Judges then in office for an additional year; and under the provisions of said Act a Judge of Probate whose term of office commenced November 3, 1898, could not hold said office longer than a reasonable time after the expiration of his term of November 3 1904, and until his successor was elected on November 8, 1904, could qualify.—*Powell v. State ex rel Hasty*, 80.
- 8 *Board of Revenue of Montgomery County; local act requiring appointment not repealed by general election.*—The local Act approved Feb. 28, 1903, providing that the members of the Board of Revenue of Montgomery County should be appointed by the Governor, is not repealed by the general election law approved Oct. 9, 1903, which provides for the election of different State and County officers.—*State ex rel. Tyson v. Houghton*, 90.
9. *Constitutional law; detention of general law contra-distinguished as to local law.*—A law that is general in its terms and is in good faith so framed, that parts of the State may come within its operation, is a general law within the meaning of the constitution; and the fact that at the time of its passage there may be in the State certain localities where there are no objects for its present operation, or where there are special laws already in existence, which must be repealed before the general law becomes operative therein, does render such law any the less general law.—*State ex rel Covington v. Thompson*, 101.
10. *Same; the general election law a general and not a local law.* The act of the Legislature providing for the holding of general elections in the State of Alabama (Acts, 1903, p. 438), is not rendered a local law by the reason of the provision of section 106 of said Act which provides that the provisions thereof should apply to all primary elections, and all elections by counties and municipalities held in the State, "except in cases where the provisions thereof are inconsistent, or in conflict with the provisions of a law governing special primary, county or municipal elections."—*Ib.* 101.
11. *Constitutional law; act repealing the county court of Clay county unconstitutional.*—The act approved September 18th, 1903, the purpose of which was to repeal an act establishing the county court of Clay county of law and equity jurisprudence, and several other acts relating to said county court (Local Acts 1903, p. 255), is unconstitutional and void, for the reason that the notice of intention to apply for the passage of such repealing act did not state the substance of the bill which was introduced and purported to be passed by the Legislature. *Hooten v. Mellon*, 245.
12. *Same; act to establish inferior. civil court of Mobile County unconstitutional.*—The act of the Legislature of Alabama approved September 26th, 1903, entitled "An Act to establish an inferior civil court of Mobile County in lieu of Justices of the Peace for the City of Mobile," (Local Acts 1903, pp. 348-352), is unconstitutional and void, because the notice required by Section 106 of the Constitution to be given stated that the court proposed to be established should have jurisdiction to the extent of \$200.—*Alford v. Hicks*, 355.
13. *Constitutional law; validity of act establishing inferior court of Bessemer.*—A published notice that "a bill will be intro-

STATUTES—*Continued.*

- duced in the next session of the legislature of the State of Alabama, to create and establish an inferior court in the city of Bessemer in precinct 33, Jefferson county, with both civil and criminal jurisdiction, as provided by sections 130 and 158, article 7 of the Constitution of the State," does not state the substance of the local act passed by the legislature establishing an inferior court of Bessemer in lieu of all justices of the peace of precinct 33 (Local Acts, 1903, p. 482); and said act establishing the inferior court of Bessemer is therefore unconstitutional and void.—*Tillman v. Porter*, 372.
14. *Constitutional law; act authorizing establishment of dispensaries in incorporated towns and cities in Walker County valid.* The act approved March 3, 1903, authorizing the establishment of dispensaries in incorporated towns and cities in Walker County, upon its ratification by a popular vote (Acts of 1903, p. 137), is constitutional and valid.—*Childs v. Shepherd*, 385.
 15. *Constitutional Law; act creating fifteenth judicial circuit; local law and unconstitutional.*—The Act of the Legislature, approved October 13, 1903, "to create the fifteenth judicial circuit of the State of Alabama, to be composed of the Counties of Autauga, Chilton, Elmore and Montgomery," is a local law within the meaning of section 110 of the Constitution of 1901; and notice of an intention to apply for the passage of this law not having been given as provided by section 106 of the Constitution, such law is void and unconstitutional.—*State ex rel Atty. Genl. v. Sayre, as Judge*, 641.
 16. *Constitutional law; repeal of dispensary act as to Coffee County and prohibiting the sale of liquors in said county.*—A notice that application will be made to the Legislature "for the repeal of the law authorizing the establishment of dispensaries, so far as the said law relates to the county of Coffee, and forbids the commissioner's court of the county of Coffee from erecting dispensaries for said county," or a notice that application will be made to repeal "an act to authorize the municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate and prohibit the sale of said liquor, approved Feb. 18th, 1899, in so far as the same applies to the county of Coffee," does not set forth the substance of the act approved Sept. 25th, 1903, entitled "An act to repeal an act entitled an act to authorize municipal and other subdivisions of the State to buy and sell spirituous, vinous and malt liquors, and to further regulate or prohibit the sale of such liquors, approved on the 18th day of Feb. 1899, in so far as said act relates to the county of Coffee, and to prohibit the sale or giving away of such liquors in the county of Coffee, after the first Monday in January, 1904." (Local Acts, 1903, p. 316); and said last named act being a local act, is unconstitutional and void, as being offensive to Section 106 of the Constitution.—*Town of Elba v. Rhodes*, 689.
 17. *Same; act establishing dispensaries in the town of Elba unconstitutional.*—The act approved Oct. 1st, 1903, entitled "An act to establish and regulate a dispensary in the town of Elba, Coffee County, Alabama, for the sale of spirituous, vinous and malt liquors, and to establish and perpetuate board of commissioners for the management of said dispensary." (Local Acts, 1903, p. 443), is unconstitutional and void, in that by its terms said act grants an exclusive right to the commissioners provided for therein as individuals, and their successors,

STATUTES—Continued.

to establish and maintain a dispensary, and thereby traffic in liquor, etc., in the town of Elba, and is therefore in violation of the organic law prohibiting monopolies, *Ib.* 689.

STATUTORY PENALTIES.

1. *Penalty for failing to enter partial payment on record of recorded judgment; liability of assignee of judgment previously recorded by assignor.*—The assignee of a judgment, which had been recorded by the assignor in the office of the judge of probate, before the assignment, is liable for the statutory penalty provided by sections 1065 and 1923 of the Code for failing within thirty days to enter partial payments made him on the margin of the record of the judgment, after being requested so to do.—*Travis v. Rhodes*, 189.
2. *Same; sufficiency of complaint.*—Where the certificate of a judgment was filed in the probate office prior to the act of February, 1899, amending sections 1065 and 1066 of the Code, the complaint, in an action to recover statutory penalty for failing to enter partial payments on record, should aver that the certificate filed contained the name of the owner of the judgment.—*Ib.* 189.
3. *Statutory provision that Insurance Company belonging to a tariff association pay penalty not unconstitutional.*—Section 2619 of the Code of Alabama providing that in case of loss an insurance policy issued by an insurer who belonged to or was a member of or in any wise connected with any tariff association or such like thing by whatever named called, etc., shall be construed to mean that the assured or beneficiary thereunder may in addition to the actual loss or damage suffered recover 25 per cent. of the amount of such actual loss, any provision or stipulation to the contrary in the policy notwithstanding is a legitimate exercise of the police power of the State.—*Cont. Ins. Co. v. Parks*, 650.
4. *Same.*—Such statutory provision is not violative of the constitutional provision for singling out particular persons or corporations and discriminating against them.—*Ib.*, 650.
5. *Same; said provision applies to foreign Insurance Companies as well as domestic.*—The fact that the insurer happens to be a foreign corporation does not render the provision unconstitutional or void as to it.—*Ib.* 650.

STREETS.

1. *Electric light companies; no exclusive right in the streets of a city.*—It is not within the power of a municipal corporation to grant any exclusive privilege in its streets to another corporation, so as to deprive itself of the right to revoke the same and grant like privileges to another corporation.—*Montg. L. & W. P. Co. v. Citizens L., H. & P. Co.*, 462.
2. *Same; same.*—Where a municipality has granted to a corporation the right to use its streets for a public utility, it has the right to grant like privileges to another corporation and to provide such restrictions and regulations as are necessary to prevent injury to the property of the first occupant and to prevent an interference with the discharge of its duties assumed to the public, and where such interference involves danger to the public, the courts will prevent it even without an ordinance upon bill properly filed.—*Ib.*, 462.
3. *Electric light companies; rights of competing companies to use all streets.*—Where an electric light company has by an ordinance of a city been granted the right to erect its poles and string its wire along the street of said city, it has no special

STREETS—*Continued.*

rights in the streets of said city except as granted by the municipal authorities, and such company does not acquire rights over any distinct or separate part of the street, such as the right of way of a railroad company over which another company cannot pass without instituting condemnation proceedings, but the rights of the first electric light company who occupies the street of said company are subject to the rights of any other electric light company to which the city may grant the right to string its wires over the street, subject only to the right of the first company to be protected from injury by the stringing of other wires so near as to injure its property or prevent the discharge of its duties to the public.—*Ib.*, 462.

STREET RAILROADS.

See RAILROADS, SUB-TITLE.

SURETIES.

1. *Promissory note; discharge of surety by extension of time to principal.*—An extension of the date of payment of a promissory note granted by the owner of the note to the principal and founded on a valuable consideration, discharges the surety, if made without his knowledge and consent; but a plea by a surety which sets up such discharge is subject to demurrer if it contains no averment that the agreement between the owner of the note and the principal debtor to extend the time of payment was supported by a valuable consideration.—*Lehnert v. Lewey*, 149.
2. *Surety; right to enjoin collection of judgment pending suit against principal.*—Suit was brought against a surety upon a bond for the faithful performance of a contract entered into by the principal with the plaintiff. The plaintiff obtained judgment on which execution was issued. Subsequently the same plaintiff instituted a suit against the principal in the bond for the breach of the contract for the performance of which the bond was given. The defendant in the last suit interposed defenses by setting up pleas in bar. Thereupon the surety against whom the judgment had been recovered filed a bill against the plaintiff to enjoin the collection of the judgment against it, until the final adjudication of the suit by said plaintiff against the principal in the bond, in which bill it was averred that the pleas at bar introduced by the principal were true. There were averred no general grounds of equitable jurisdiction to enjoin the collection of the judgment. *Held*: that the surety could not maintain such a bill to enjoin the collection of the judgment.—*Damp. Habil v. U. S. F. & G. Co.*, 365.
3. *Liability of different sets of sureties on guardian's bond.*—A bill by a ward against the guardian and several sets of sureties on his bond is not bad on the ground for misjoinder, and multifariousness.—*Matthews v. Mauldin*, 434.
4. *Same; execution of bond.*—A guardian's bond executed by the bondsmen and not by the guardian is good as a common law liability.—*Ib.* 434.
5. *Same; liability of sureties on the first bond.*—The sureties on the old bond of the guardian are liable for any devastavit prior to their release on the approval of the new bond.—*Ib.* 434.
6. *Same; liability of new bondsmen.*—The sureties on a new bond of a guardian are liable on said bond for misappropriations

SURETIES—Continued.

by the guardian before the making of a new bond upon the ground of the guardian's obligation to make a true account. *Ib.* 434.

7. *Justice of the peace; common law certiorari; judgment cannot be rendered against sureties on certiorari bonds.*—The statute which provides that when on certiorari the judgment is affirmed, judgment must be rendered against the sureties on the certiorari bond, as well as the principal (Code § 493), applied exclusively to statutory certiorari; and when a bond is given for common law writ of certiorari, to bring up to the circuit court, the proceedings before a justice of the peace, upon the affirmance of the judgment, it is error to render judgment against the surety on the certiorari bond.—*Webb & Stagg v. McPherson & Co.*, 540.

TENANTS IN COMMON.

1. *Petition by co-tenant for sale of lands for division should aver petitioner's interest.*—Where a tenant in common files a petition to have the property jointly owned sold for division upon the grounds that it cannot be equitably divided, the petition should set out the interest of the petitioner in said lands, and should pray a distribution of such interest of the proceeds to the petitioner.—*Edwards v. Edwards*, 267.
2. *Same; where minors are interested, guardians ad litem should be appointed.*—In a proceeding to sell lands owned by tenants in common for division, where some of the co-tenants are minors, it is error for the court to render a decree without having the infant defendants presented by a guardian ad litem. *Ib.* 268.
3. *Petition for sale of lands for division; when depositions of witnesses should be suppressed.*—In a proceeding to sell lands owned jointly for division among the co-tenants, upon the ground that the same cannot be equitably divided, where there is no notice of the filing of interrogatories given as required by the statute' (Code §§ 732, 733, 3181) the depositions taken upon such interrogatories should be suppressed.—*Ib.* 268.
4. *Bill by tenants in common for sale of lands; when sale properly ordered, notwithstanding failure to make proof that lands could not be equitably divided.*—Where a bill is filed by tenants in common against other co-tenants for the purpose of having the lands sold, and the proceeds divided among the tenants, and it is averred in the bill that said "lands cannot be equitably divided among the tenants in common aforesaid, without a sale thereof," and in their answers the defendants fail to deny this averment in said bill, the fact that there was no evidence introduced that the lands could not be equitably partitioned, does not make a decree ordering the sale erroneous, if complainant is otherwise shown to be entitled to such relief; since the failure on the part of the defendants to deny such averment of the bill was an admission of the truth of that averment in said bill, the fact that there was no evidence introduced that the lands could not be equitably partitioned, does not make a decree ordering the sale erroneous, if complainant is otherwise shown to be entitled to such relief; since the failure on the part of the defendants to deny such averment of the bill was an admission of the truth of that averment, dispensing with the necessity for evidence.—*Berry Lumber Co. v. Garner*, 488.

TENDER.

1. *Redemption; tender of purchase money and lawful charges; excused when purchaser absent from the State.*—Where one seeks to exercise the right of statutory redemption, and the purchaser at the mortgage or execution sale is absent from the State, a tender, to be sufficient to authorize the maintenance of a bill in equity for redemption, must be made by a deposit of the money in court upon the filing of the bill; and the absence of the purchaser or his vendee from the State excuses the tender in person and authorizes the filing of the bill. *Francis v. White, Admr.*, 590.
2. *Bill to redeem; when statutory requirements sufficiently complied with.*—In a bill filed to redeem lands from a sale under an execution, where it is averred that the purchaser has absented himself from the State, that the complainant has made diligent inquiry to ascertain his post office address, has repeatedly written to him asking for an account of the lawful charges claimed by him to have been paid, has requested his vendees to inform him what lawful charges are claimed by them; and that the original purchaser and his vendees has each refused to give any information; and that the complainant has made diligent inquiry as to the lawful charges, and has paid into court the amount of all lawful charges he has been able to ascertain, and offers to pay all other lawful charges which may be ascertained by the court: such averments show a sufficient excuse for failure of the complainant to pay the lawful charges, and authorize the maintenance of a bill to redeem.—*Ib.* 590.
3. *Bill to redeem; sufficiency of averments as to tender of lawful charges.*—On a bill to redeem property sold under execution, where it is averred that the complainant has ascertained that the purchaser at said sale had paid designated amount as a tax levied by the city wherein the property was located, which said amount "is herewith tendered and offered to said defendant, as well as the further sum of \$41.76, legal interest on the amount of said assessment," such averment of tender is not sufficient: in that, it fails to aver that the amount is paid into court—it appearing that the purchaser is absent from the State. *Ib.* 590.
4. *Statutory right of redemption; where lands are purchased by several parties, tender not required to be made to each of the purchasers.*—Where property is sold under execution, and the purchaser at said sale subsequently sells separate portions of said property to two or more other parties, in order for the original owner to redeem the lands so sold, it is not necessary that he should make a tender of the purchase price, together with the other charges fixed by the Statute, to the original purchaser and each of his vendees; but, under such circumstances, the defendant, by redemption, can come into equity by paying into Court the money which the law requires, and ask the Court to distribute it to the parties according to their respective interests and rights, and offer to do and pay whatever more additional thereto may be just and equitable; and upon such averments and offer, he can maintain a bill to redeem.—*Ib.* 590.
5. *A bill to redeem; sufficiency of offer to pay for execution of deed.* Where a bill is filed in a court of equity seeking to redeem lands sold under execution, and the complainant offers to pay all lawful charges and asks for information as to their amount, the cost of executing a deed will be considered as included in complainant's offer to do equity.—*Ib.* 590.

TITLE.

1. *Defendant may show his right and title to thing in controversy.*
While, as a rule, the plaintiff has to rely on the strength of his title to the thing in controversy, this doctrine does not preclude the defendant from showing a right and title thereto.—*Morey v. Monk*, 175.
2. *Same; case at bar.*—In an action by the heirs at law of an intestate to recover from the intestate's step-son, who has been named as beneficiary in a benefit certificate, the proceeds of such certificate, the application of membership of intestate, the benefit certificate to intestate's wife, who was also defendant's mother, the surrender after her death, the benefit certificate of defendant, the payment of assessments by the insured and the proof of his death, relate to the history of the insurance contract and to the defendant's right and title thereunder, and are properly admissible in evidence.—*Ib.* 175.
3. *Color of title; when deed admissible as.*—In an action of forcible entry and detainer, the plaintiff after offering evidence, that it was, prior to the entry of the defendant on the lands in controversy, in the actual possession of another portion of the lands described in a deed which also conveyed the lands in dispute, may introduce the deed in evidence as color of title.—*Bailey v. Blacksher Co.*, 254.
4. *Same; possession under, to what extends.*—Mere color of title does not draw possession to one who is not in, or does not take, actual possession of some part of the land conveyed; but *possessio pedis* of any part of the land conveyed, in law, is held to be actual possession of the entire tract.—*Ib.* 254.
5. *Title; husband and wife.*—When there is a controversy as to whether property belongs to the husband or to the wife, the possession of the husband is not adverse to the wife, and such possession is not evidence of the husband's title.—*Anglin v. Thomas*, 264.
6. *Same; same; repetition of charges.*—A charge setting forth above principle, is not a mere repetition of a charge that "the possession of the husband is the possession of the wife when the title to the property is shown to be in the wife," as said last quoted charge ignores the consideration that the husband's possession is not evidence against the wife's title.—*Ib.* 264.
7. *Mortgage; assignment thereof; title does not revert by erasure of assignment.*—Where a mortgage is assigned by the mortgagee endorsing the assignment on the back of such mortgage, which assignment is duly acknowledged before a notary, and subsequently the assignee redelivered the mortgage to the mortgagee, and erased from the assignment endorsed thereon, the name of the assignee, such erasure and delivery of the mortgage does not have the effect to reinvest the title in the mortgagee, but the title remained where the assignment had placed it.—*Carter v. Smith*, 414.
8. *Statutory bill to quiet title; what possession necessary to maintain it.*—To maintain a bill under the statute for the determination of claims to real estate and to quiet title thereto, it is necessary for the complainant to aver and prove that at the time of the institution of the suit the complainant's possession to the lands involved was peaceable, as contradistinguished from disputed or contested possession, and that it was under claim of ownership.—*Lyon v. Arndt*, 486.
9. *Statutory bill to quiet title; what possession necessary to maintain it.*—To maintain a bill under the statute to compel determination of claims to real estate and to quiet title thereto, it must be shown that complainant was in the peaceable pos-

TITLE—*Continued.*

- session of said property as contradistinguished from contested or disputed possession.—*Randle v. Daughdrill*, 490.
10. *Same; same; sufficiency of evidence.*—In such cases where the evidence shows that the land in question was wild and uncultivated land; that the defendant claims under a deed; pays taxes thereon; has kept trespassers off said property, and has taken tan bark therefrom, it cannot be said that the plaintiff is shown to have such peaceable possession as entitles him to relief.—*Ib.* 490.
 11. *Color of title; may be shown by void deed; exception.*—While as a general rule, a void deed is admissible in evidence to show color of title to the person claiming thereunder, if, however, the deed offered is void because of the uncertain and indefinite description of the land conveyed, such a deed would not convey color of title, and possession under it would be limited to *possessio pedis*.—*Brannan v. Henry*, 698.

TRADING STAMPS.

1. *Municipal corporation; license for issuing trading stamps; validity thereof.*—An ordinance of the city of Montgomery requiring each merchant, doing business in said city, who shall issue any trading stamps in connection with his business, to pay "a license tax of \$100.00 therefor," and fixing a penalty of \$100.00 for each stamp issued without having taken out said license, is unconstitutional and void.—*City Council of Montgomery v. Kelly*, 352.

TRESPASS AND TRESPASSERS.

1. *Action of trespass; when principal liable for acts of agent.*—In an action of trespass to recover damages for the wrongful taking of mules, where it is shown that the defendant was at the time of the taking a sheriff, and that one of his deputies, according to his directions, went with an officer of the United States Army, to which the mules belonged, to locate the mules, and there was further evidence tending to show that said deputy assisted said army officer in taking the mules from the plaintiff, a charge which instructs the jury that if said deputy acted as the agent and under the instructions of the defendant in taking said mules, and said taking was wrongful, then the defendant would be guilty of a wrongful taking, asserts a correct proposition of law, and is properly given at the request of the plaintiff.—*Fulgham v. Carter*, 227.
2. *Trespass upon railroad track; when child incapable, by reason of tender age, of exercising discretion, may commit.*—A child incapable, by reason of tender age, from exercising discretion may become a trespasser upon the same facts that would impress that character upon a person of legal discretion, and this is true, although the child would be incapable of contributory negligence.—*N. C. & St. L. Ry. Co. v. Harris*, 249.
3. *Same; same; case at bar.*—Where a little child nineteen months old came on the track at the crossing, and, seeing the train, turned up the track, went several feet away from the crossing, stopped and stood gazing at the approaching engine, she became a trespasser on the railroad company's track.—*Ib.* 249.
4. *Same; duty of railroad company.*—A railroad company owes no duty to a trespasser upon its track other than to resort to all reasonable means to avoid injuring such trespasser after its servants become aware of the trespasser's presence and peril. *Ib.* 249.

TRESPASS AND TRESPASSERS—*Continued.*

5. *Failure to give statutory signal at railroad crossing; effect in case of injury to trespasser.*—Where a little child in the act of crossing a railroad track, on the approach of an engine, which had failed to give the statutory signal, turned up the track, approached the engine and thereby became a trespasser, the railroad company is liable for injuries sustained if it be shown that the child would not have entered upon the crossing had the signal been given.—*Ib.* 249.
6. *Same; same.*—Where it is shown that the trespasser would not have heeded the signals if given, failure to give same does not render a railroad company liable for injuries to such trespasser.—*Ib.* 249.

TRIAL AND ITS INCIDENTS.

1. *Trial and its incidents; charges of court to jury.*—Where the court gives its charges to the jury orally, and the defendant reserves no exception to any part of the charge, and after having so instructed the jury, the court refuses to give a written charge requested by the defendant, but subsequently upon the consent of the plaintiff gives said charge, but refuses the request of the defendant to so modify the oral charge as to harmonize with the charge so given, such refusal of the court would not work a refusal of the case.—*Birmingham Belt R. R. Co. v. Gerganous*, 238.
2. *Trial and its incidents; refusal to give charge when not reviewed.*—Where the only recital in a bill of exceptions relative to the refusal of the court to give a charge requested, is "The defendant, in writing, requested the general charge for the defendant, but the court refused to give the same, to which action of the court refusing to give the general charge in favor of the defendant, he duly excepted," and the charge referred to is not set forth in the bill of exceptions, the Supreme Court will not review the rulings of the trial court in refusing said charge.—*Lunsford v. Bailey & Howard*, 319.
3. *Trial of civil case; not necessary to authorize verdict.*—In the trial of a civil case, it is only necessary in order to authorize a verdict that the jury should be reasonably satisfied; and therefore, a charge which instructs the jury that they must be satisfied to a "reasonable certainty," before they can return a verdict, is erroneous, as exacting too high a degree of proof. *Ib.* 368.
4. *Trial and its incidents; when the introduction of evidence discretionary with the court.*—In the trial of an action of assumpsit when the plaintiff has made out a *prima facie* case, after the defendant has introduced his testimony, and after the plaintiff has closed his testimony in rebuttal, as to whether the defendant will be permitted to introduce other testimony which was not in rebuttal of plaintiff's testimony, is in the discretion of the trial court, and is not revisable.—*Sou. Ind. Ins. v. Hellier*, 686.

TRIAL WITHOUT JURY.

1. *Trial without jury; conclusion and judgment of the court upon the evidence must be shown in bill of exceptions, and exception must be shown, before same can be reviewed on appeal.* In the trial of a cause by the court without the intervention of a jury the bill of exceptions must show what the conclusion and judgment of the trial court on the evidence were, and unless the same are disclosed, the Supreme Court is without jurisdiction to review the action of the trial court in that behalf,

TRIAL WITHOUT JURY.—*Continued.*

- although it may appear from the minute entry what judgment was rendered. If the bill of exceptions discloses the judgment but fails to contain an exception thereto, the ruling of the trial court cannot be reviewed.—*Morey v. Monk*, 175.
2. *Same; same; case at bar.*—Section 14 of the Acts of 1875-6, providing for the trial of causes by the City Court of Selma, without a jury, authorizes a review by the Supreme Court of the conclusion and judgment of the City Court of Selma upon the evidence, only when such conclusions and judgment are shown in the bill of exceptions and the bill of exceptions contain exceptions thereto.—*Ib.* 175.
 3. *Same; same; rulings of the trial judge upon the admissibility of evidence may be reviewed, when properly presented by bill of exceptions, when the judgment and conclusions on the evidence cannot be reviewed.*—The fact that the judgment of the trial court, where a cause is tried without a jury, cannot be reviewed on appeal, because the bill of exceptions fails to show what the judgment was and fails to note exceptions thereto, does not prevent the review by the Supreme Court of the rulings of the trial judge upon the admissibility of evidence (*Overruling Alabama Fruit Growing and Winery Association v. Garner*, 119 Ala. 70.)—*Ib.* 175.
 4. *Same; same; same; case at bar.*—In an action by the heirs at law of an intestate to recover, from the step-son of such intestate, the amount paid by a benefit society to such step-son, on an insurance policy in such society, where the laws of the State and the rules of the order, at the time the policy was issued, required that the beneficiary be either a "member or members of his family, blood relations or person or persons dependent on him" the ruling of the trial court as to the facts, and the soundness of his conclusions and judgment, where same are not shown by the bill of exceptions and exception shown to have been taken thereto, are presumed to have been correct, unless based on evidence improperly admitted.—*Ib.* 175.

TROVER.

1. *Trover; elements of conversion; when sufficient demand not shown.*—When personal property has been placed by the owner in possession of another, before the latter can be guilty of conversion, the evidence must show that a demand has been made by the owner or his agent, for the return of the property, and that the holder thereof has refused to surrender the same; and in an action of trover for the wrongful conversion of such property, where the evidence shows that a demand was made for its return by the attorney who instituted the suit, and such demand was refused, but there is no proof that the attorney had authority from the owner of the property to make the demand, there is not shown such a demand of the property as will authorize the recovery in an action of trover.—*Jesse French Piano Co. v. Johnston*, 420.
2. *Action on the case; when necessary to prove price at which property is sold.*—In an action on the case by a landlord to recover damages for the defendant preventing the enforcement of his lien by removing property subject thereto, where the plaintiff does not show at what price he sold said property, or that any part of the purchase money remains unpaid, but introduces evidence tending to show only the value of the property, plaintiff is not entitled to recover; the evidence so introduced having no tendency to prove plaintiff's loss.—*King v. Henderson*, 460.

TROVER—Continued.

3. *Action for conversion of property; what question for the jury.*
In an action to recover damages for the loss and destruction of a lien in favor of the plaintiff by reason of the defendant's removing certain property and converting it to his own use, where the evidence shows that a certain quantity of the property described in the complaint was delivered at certain designated places for the plaintiff, but there was no definite proof as to the weight of the cotton so delivered, it is for the jury to ascertain whether or not such cotton was sufficient to pay the plaintiff, and, therefore, it was error for the court to instruct the jury that the plaintiff should recover the value of all the property so delivered.—*Baker v. Cotney*, 566.

TRUSTS AND TRUSTEES.

1. *Trust and trustees; trustee has no power to appoint successor.*
A trustee has no power to appoint his successor in trust, unless such authority is expressly conferred on him in the instrument by which the trust was created.—*Whitehead v. Whitehead*, 163.
2. *Same; personal representative does not succeed trustee.*—Under the provisions of the statute that upon the death of a trustee the trust estate does not descend to his heirs, or pass to his personal representative (Code §1044), the executor of the will of a trustee does not succeed to the right to administer the trust.—*Ib.* 163.
3. *Widow of trust not entitled to preference of appointment.*—The widow of a trustee is not entitled to be preferred in the appointment of a successor to her deceased husband to administer the trust estate.—*Ib.* 163.
4. *Enforcement of express trust; when laches not shown to exist; decedent's estate.*—A testator who left surviving him a wife and a minor child 11 years old, provided in his will that after a specific allowance to the wife, the balance of his estate should be divided equally between his wife and child, and also provided in the will that his wife should have the care, maintenance and education of his child and for that purpose he gave to the wife the control and management of all the moneys of his child under his will. The child was kept in ignorance of the provisions of her father's will, and knew nothing of the creation of the trust for her benefit. At different times the wife of the testator admitted her obligations to the child. The wife of the testator induced the child to go and live in a distant State with her aunts, and at no time did the wife make any provisions or give any moneys to the child or her aunts for her benefit. 37 years after the probate of the will of the testator, the wife died, leaving a substantial estate, and left a will which was invalid because not witnessed. By this will she bequeathed \$1500 to said child as "her rightful portion." After the death of the wife, the child, upon investigation, discovered for the first time the provisions of her father's will, and then a few months after the ascertainment of the facts filed a bill in chancery for the establishment and enforcement of the trust created by her father's will for her benefit and for an accounting. *Held*: that there was by the father's will created a trust for the benefit of the child, and the surviving wife was the trustee, and that by reason of the child having been kept in ignorance of her rights, she was not guilty of laches which would deprive her from seeking in a court of equity the establishment and enforcement of the express trust in her behalf as against the estate of the deceased wife.—*Mullen v. Walton*, 166.

TRUSTS AND TRUSTEES—Continued.

5. *Resulting trust in lands; law creates in favor of party paying purchase money, but taking conveyance in name of another; agreement between the grantee and the purchaser to that effect need not be in writing.*—If the purchaser of lands, paying the purchase money, takes the conveyance in the name of another, a trust in the lands results by construction to him from whom the purchase money moves, and the fact that there was a parol agreement between these two parties recognizing said resulting trust does not take the transaction out of the category of resulting trusts.—*Long v. Mechem*, 405.
6. *Same; same; Section 1041 of Code.*—Those trusts in lands which result by implication or construction of law, such as a trust resulting to the purchaser of lands who takes the title in the name of another, are not required by Section 1041 of the Code to be in writing.—*Ib.* 405.
7. *Trust estate; creation, continuance and termination of trust.* Where lands are conveyed to a certain named person as trustee for the use, benefit and behoof of his wife and her children, and in special trust for the said wife and her children or issue "to live, dwell or inhabit thereon and therein, and for the support and maintenance of" the said wife, and "for the support, maintenance, protection and education of said children or issue," and there is conferred upon the trustee the power to sell the corpus of the estate in certain contingencies for reinvestment, to the same uses, upon the death of the wife who was the trustee and mother, the trust terminates, and the full legal title, freed from such trust, unites with the legal title in the children vesting in them an absolute fee simple title in the property conveyed.—*Edwards v. Edwards*, 268.
8. *Deed of trust; presumption after foreclosure.*—Where a deed of trust given to secure the payment of a debt recites that upon the written request of the beneficiary after default in the payment of the debt, the trustee should take possession of the property and sell it in execution of the trust, if the debt secured by the deed of trust is transferred by the beneficiary, and subsequently upon default in the payment of the debt, the trustee executes the trust by selling the property, and at the sale the assignee of the original beneficiary becomes a purchaser, to whom the trustee executes a deed, it will be presumed that the execution was according to the request of the assignee properly and regularly made known to the trustee.—*Collier v. Alexander*, 422.

UNDUE INFLUENCE.

1. *Undue influence; as to transactions inter vivos.*—In transactions *inter vivos* where confidential relations exist between the parties, the law raises up the presumption of undue influence, and when the donee is the dominant party in the transaction, the burden is upon him of repelling such presumption by competent and satisfactory evidence; which is usually done by showing that the grantor had the benefit of competent and independent advice of some disinterested party.—*Hutcheson v. Bibb*, 586.
2. *Undue influence as relating to testamentary transactions.*—In transactions testamentary in character, the mere existence of confidential relations between the debtor and the beneficiary under the will, are not in and of themselves alone sufficient to raise presumption of undue influence in the making of the will, that would avoid it in the absence of rebutting evidence; but undue influence such as will avoid a will must amount to fraud or coercion so as to show that the will as executed was not as a matter of fact the will of the testator.—*Ib.* 586.

UNLAWFUL DETAINER

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

USURY.

1. *Mortgage; effect of usury as to bona fide purchaser.*—A stipulation for usurious interest upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a *bona fide* purchaser without notice as to outstanding equities in third parties; and as against such mortgagee, the holders of outstanding equities are entitled to the same measure of relief as they would have been against the mortgagor had not the mortgage been executed.—*Morris v. Bank of Attalla*, 638.
2. *Trover; admissibility in evidence of usury in mortgage debt.* In an action of trover brought by a mortgagee to recover damages for alleged conversion of the property conveyed in the mortgage, where the defendant sets up the defense that he had a lien upon the property in controversy by reason of a mortgage which was executed prior to the mortgage to the plaintiff, but which was not recorded, the fact as to whether the plaintiff's debt secured by the mortgage was tainted with usury, is a material inquiry, and testimony tending to show that there was usury in such debt, should be admitted when offered by defendant.—*Id.* 638.
3. *Arbitration; conclusiveness of award; usury.*—Where the question of indebtedness between two parties is submitted by agreement of the parties to arbitrators and one of the stipulations of the submission was that legal interest should be computed upon the items of indebtedness found, from the dates of maturity, and in accordance with such submission an award is made by the arbitrators ascertaining the amount to be due from one of the parties, for which notes are given, which are secured by a mortgage, if upon default being made in the payment of the notes, a bill is filed to foreclose the mortgage, the plea filed by the debtor mortgagor to such bill, alleging that there were numerous items of usury included in the finding and award of the arbitrators presents no defense to the maintenance of such bill; the issue of usury *vel non* having become foreclosed and concluded by the award.—*Hoffman v. Miller*, 678.

VARIANCE.

1. *Evidence; what sustains averment of complaint.*—Where the complaint described the leased premises as "being the building which was on the date of the demise of the property occupied by R. Seal as a grocery store," and the lease which is introduced in evidence describes the property as "being the building which is now occupied in part by R. Seal as a grocery, and Johnson Bros. as a saloon," there is no variance between the pleading and the proof.—*Morningstar v. Queens*, 186.
2. *Variance; what constitutes variance between the averments and the proof.*—One count of the complaint for personal injuries resulting in the death of the plaintiff's intestate, alleged that plaintiff's intestate "was violently thrown from the train and so greatly injured," etc., etc. The proof tended to show that said intestate voluntarily stepped off the moving train on to the station platform, lost his footing and fell, receiving the alleged injuries; *Held*: that there is not a fatal variance between the allegations of said count and the proof, but that the evidence substantially supports the averment which is sufficient.—*K. C. M. & B. Ry. Co. v. Matthews*, 298.
3. *Pleading and practice; variance cannot be raised first time on appeal.*—A question of variance between the allegations of a complaint and the testimony introduced at the trial of a case

—Continued.

new trial; evidence of jurors.—Where on a motion for trial, the verdict rendered is impugned as being a silent verdict, it is competent for the plaintiff in whose favor the verdict was returned to prove by the jurors themselves in support of their said verdict that it was not arrived at by a process which constituted it a quotient or illegal verdict.—*Ib.* 160.

See CRIMINAL LAW—SUB-TITLE.

WAIVER.

1. *What considered not a waiver of provision in policy requiring notice of loss.*—Where a policy of insurance provides that if a fire occurs the insured shall give immediate notice of any loss thereby in writing to the Company, a statement by the local agent of the Company to the assured that the policy had been cancelled before the loss and that the Company denied liability thereunder does not constitute a waiver by defendant of the notice required by the policy unless the agent had authority to bind the Company by this statement.—*Cont. Ins. Co. v. Parks*, 650.
2. *Same; what sufficient waiver of notice.*—If the local agent had authority to bind its principal a distinct denial of defendants liability because the policy had been cancelled would be a waiver of notice and proof of loss required of the assured by the policy.—*Ib.* 650.

WAREHOUSES AND WAREHOUSEMEN

1. *Warehouseman; should exercise ordinary diligence.*—A warehouseman is bound to use ordinary diligence in keeping goods intrusted to his charge, which means, he should use such care and diligence as a man of ordinary prudence bestows on his own affairs.—*Sou. Ry. Co. v. Aldredge & Shelton*, 368.
2. *Warehouseman; burden of proof when loss of goods shown.*—If a warehouseman fails on demand to deliver goods intrusted to him, or does not account for such failure, prima facie negligence will be attributed to him, and the burden of proving the loss without the want of ordinary care is devolved upon him.—*Ib.* 368.
3. *Action of railroad company as warehouseman; admissibility of evidence.*—In an action against a railroad company as a warehouseman, the distance which the plaintiff lives from the depot of the defendant where the goods were stored, is irrelevant to any issue involved, and therefore testimony as to such fact is inadmissible.—*Ib.* 368.

WILLS.

1. *Unique influence as relating to testamentary transactions.*—In transactions testamentary in character, the mere existence of confidential relations between the debtor and the beneficiary under the will, are not in and of themselves alone sufficient to raise presumption of undue influence in the making of the will, that would avoid it in the absence of rebutting evidence; but undue influence such as will avoid a will must amount to fraud or coercion so as to show that the will as executed was not as a matter of fact the will of the testator.—*Hutcheson v. Bibb*, 586.

WITNESSES.

1. *Indictment for abandoning family; wife competent witness.*—The statute making the wife a competent witness against her husband under a indictment for abandoning his family (Acts 1903, p. 32), is not an *ex post facto* law within the meaning of the constitutional provision.—*Wester v. State*, 56.
2. *Indictment for abandoning family; admissibility of evidence.*—On a trial under an indictment for abandoning his family, it is not competent for the defendant to ask the witness whether

WITNESSES—*Continued.*

- or not he had taken liberties with his wife's person prior to the abandonment.—*Ib.* 56.
3. *Expert testimony; competency to testify as to condition of railroad track.*—A witness who is shown to be skilled and experienced in respect of track conditions and track constructions, is competent to give opinions as to the defective and unsafe condition of a railroad track.—*Northern Ala. R. R. Co. v. Shea*, 119.
 4. *Same; case at bar.*—A witness who had had long experience as a brakeman, whose duties had to do with the regulation of the speed of the train under the varying circumstances incident to a railway, according to curve, grade, etc., is qualified to give his opinion on each of these matters, and to state that a train, at a particular time and place, was running at a dangerously high speed.—*Ib.* 119.
 5. *Same; examination of witness.*—Where an objection is sustained to a question propounded a witness and such question is afterwards answered, there is no error of which the excepting party can complain.—*Bham. Ry. L. & P. Co. v. Rutledge*, 196.
 6. *Same; cross-examination of witness.*—Where a physician, witness for defendant, testified that he was sent by the defendant to see plaintiff after his injury, the plaintiff may bring out on cross-examination what the defendant's attorney said to him, as tending to show a bias unfavorable to defendant.—*Ib.* 195.
 7. *Same; examination of witness.*—Where a witness was asked to state at what rate of speed the car approached the railroad crossing, his answer that "it would be hard to judge that, because it had just started and it could not have been running fast," was properly excluded, as being 'the witness' conclusion.—*Ib.* 195.
 8. *Evidence; examination of witnesses.*—In the examination of witnesses, questions which are leading are properly refused.—*Fulgham v. Carter*, 227.
 9. *Proof of good character of witness whose testimony had been impeached by evidence of contradictory statements, admissible.* Where a witness has been impeached by proof of contradictory statements, evidence of the good character of such witness is admissible.—*Brown v. State*, 287.
 10. *Same; testimony of father.*—The father is a competent witness to testify to the good character of the son.—*Ib.* 287.
 11. *Admitted showings as to evidence of absent witnesses; effect when such showing is not introduced and the witness appears and testified contrary to the showing.*—The rule that an attempt by a party to make the false appear true is a circumstance which the jury may consider to the disadvantage of the party so doing, does not apply where a showing is admitted, but is not introduced by the party in whose favor it is made, and the witness subsequently appears and testifies contrary to the showing.—*Ib.* 287.
 12. *Same; introduction of witness, for whom a showing in behalf of the defense has been made, by the State.*—A showing as to a witness of the defense which has been admitted by the State but not introduced by the defense and which, on the appearance of the witness during the trial, is introduced by the State, and the State cannot contradict same by the introduction of the witness to prove the falsity of the showing.—*Ib.* 287.
 13. *Execution of written instrument by making mortgage; not invalid when attesting witness, agent or employee or mortgagee.*—Where in the execution of a mortgage, the mortgagor signs the same by making his mark, the fact that the attesting witness was an agent or employee of the mortgagee, does not render the mortgage invalid.—*Morris v. Bank of Attalla*, 638.

WRITTEN INSTRUMENTS.

See EXECUTION OF WRITTEN INSTRUMENTS. Digitized by Google

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